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Recent Decisions

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Conclusion

While the maze of technical definitions, requirements and standards tends to conceal the broad purposes of the Federal Food, Drug and Cosmetic Act, a studied reading of its text and cases arising from it, will reveal that its overall aim is to afford the consuming public protection from the unscrupulous who would sacrifice the health and well-being of the citizenry in order to capitalize on their gullibility.

As its name discloses, the Act provides for three separate spheres of regulation, the control of drugs, cosmetics, and food. Supervision of food production is further divided into prevention of adulteration and prevention of misbranding. Finally, control over misbranding is effected by regulating the identity, quality, and quantity as declared on the labeling. Since the producer of food must either conform to the standards prescribed, or risk forfeiture of the misbranded article, an effective supervision is attainable. But the administration of the Act must be flexible. The current popularity of dietary and similar special or enriched foods presents a good illustration for the need of flexibility. To prevent the flooding of an eager market with inferior or perhaps even dangerous "enriched" foods requires an increased vigilance that is attainable only through readily adjustable administrative regulation. The risk of bodily harm to the citizenry demands facile administrative supervision rather than a system of legislative amendment.

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RECENT DECISIONS

ADMINISTRATIVE LAW—FINDINGS OF FACT OF NLRB—SCOPE OF REVIEW BY COURTS OF APPEALS.—*Universal Camera Corp. v. National Labor Relations Board,* 340 U. S. ...., 71 S. Ct. 456, 95 L. Ed. *304 (1951). An employee of the Universal Camera Corporation gave testimony in a hearing conducted under the provisions of the National Labor Relations Act, 49 STAT. 449 *et seq.* (1935), 29 U. S. C. §§ 151 *et seq.* (1946), as amended, 61 STAT. 136 *et seq.* (1947), 29 U. S. C. §§ 141 *et seq.* (Supp. 1950), for which reason the corporation, according to the NLRB's finding, discharged him. A petition was filed by the Board to enforce an order requiring the corporation to reinstate the

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or on its container or wrapper, or on any two or all of these, as may be necessary to render such statement likely to be read by the ordinary individual under customary conditions of purchase and use of such food."

employee and to cease and desist from discriminating against employees who file charges or give testimony under the Act. The Court of Appeals for the Second Circuit, 179 F. (2d) 749 (2d Cir. 1950), entered an enforcement order, and the corporation brought certiorari.

The basic issues involved in this case are: (1) whether the court of appeals is entitled to consider the record as a whole, including conflicting evidence, or is bound to accept the Board's decision as conclusive if supported by substantial evidence without taking into consideration contradictory evidence in the record; and, (2) whether a report of an examiner rejected by the Board is part of the record to be reviewed by the court of appeals.

The Supreme Court held that when a decision of the NLRB is reviewed by the courts, it is the duty of the court to scrutinize the *entire record,* taking into consideration conflicting evidence, to ascertain if the order of the Board is supported by substantial evidence.

This case is significant in that it points up the question whether the courts' power to review an NLRB ruling has been enlarged by the Taft-Hartley Act over that existing under the Wagner Act, 49 STAT. 449 *et seq.* (1935), 29 U. S. C. §§ 151 *et seq.* (1946). Hence, the determination of this question must rest upon these two Acts as interpreted by the judiciary.

The Wagner Act provided that the Board's decision was conclusive if supported by evidence. 49 STAT. 454 (1935). The Taft-Hartley Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . ." 61 STAT. 148 (1947), 29 U. S. C. § 160(e) (Supp. 1950). The Supreme Court interpreted the Wagner Act to mean that the Board's findings were conclusive if supported by "substantial evidence." *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944). In *Consolidated Edison Co. et al. v. NLRB et al.*, 305 U. S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938), it was held:

> . . . that the statute [Wagner Act] in providing that "the findings of the Board as to facts, if supported by evidence, shall be conclusive," means supported by substantial evidence. . . . Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Under the Wagner Act, it was consistently held that Congress had limited the courts in reviewing the Board's decisions to issues of law; fact finding was within the province of the Board, subject only to the requirement of substantial evidence. See *NLRB v. Waterman Steamship Corp.*, 309 U. S. 206, 60 S. Ct. 493, 84 L. Ed. 704 (1940). Congress entrusted the Board, rather than the courts, with the power to draw inferences from the facts. *NLRB v. Hearst Publications, Inc., supra; NLRB v. Link-Belt Company,* 311 U. S. 584, 61 S. Ct. 358,

85 L. Ed. 368 (1941); *NLRB v. Falk Corporation,* 308 U. S. 453, 60 S. Ct. 307, 84 L. Ed. 396 (1940). The courts could not set aside an inference of fact of the Board although they might have drawn a different inference. *NLRB v. Southern Bell Telephone & Telegraph Co.,* 319 U. S. 50, 63 S. Ct. 905, 87 L. Ed. 1250 (1943). The courts were precluded from weighing the evidence, *NLRB v. Nevada Consolidated Copper Corp.,* 316 U. S. 105, 62 S. Ct. 960, 86 L. Ed. 1305 (1942); *NLRB v. Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 60 S. Ct. 203, 84 L. Ed. 219 (1939), or the testimony, *Washington, Virginia & Maryland Coach Co. v. NLRB,* 301 U. S. 142, 57 S. Ct. 648, 81 L. Ed. 965 (1937).

After the passage of the Taft-Hartley Act, there was a divergence of opinion whether the Act had enlarged the scope of judicial review of the Board's decisions. When the instant case was before the court of appeals, it was stated, 179 F. (2d) at 752: "We cannot agree that our review has been 'broadened'; we hold that no more was done than to make definite what was already implied." Two other courts previously had held that there was no change, the judges declaring that they could not weigh the evidence, *Eastern Coal Corp. v. NLRB,* 176 F. (2d) 131 (4th Cir. 1949), nor provide a hearing de novo, *Victor Mfg. & Gasket Co. v. NLRB,* 174 F. (2d) 867 (7th Cir. 1949); *NLRB v. Austin Co.,* 165 F. (2d) 592 (7th Cir. 1947). Another court held that the Act gave the courts more "latitude" on review, but did not elaborate on the limits of this extension. *NLRB v. Caroline Mills, Inc.,* 167 F. (2d) 212 (5th Cir. 1948). However, fewer of the Board's orders have been enforced under the Taft-Hartley Act than under the Wagner Act. See the interesting statistics collected in Note, *Developments in the Law—The Taft-Hartley Act,* 64 HARV. L. REV. 781 (1951).

Mr. Justice Frankfurter, in his exhaustive opinion in the instant case, examined the history of the NLRB—the legislative background as well as the Court's decisions—concerning the scope of judicial review of the Board's findings of facts. He acknowledged that the terminology of the Supreme Court in its previous opinions readily lent itself to the justifiable belief that the requirements of the Wagner Act were satisfied if the evidence supporting the Board's conclusions was substantial when considered by itself. But this, he continued, did not mean that the Court ever decided this point explicitly.

Although the practice of surveying the record for substantial evidence in support of agency fact-finding, without considering contrary evidence, was the previous rule, the Taft-Hartley Act read in *pari materia* with the Administrative Procedure Act, 60 STAT. 237 (1946), 5 U. S. C. § 1009(e) (Supp. 1950), has substantially changed the nature of the reviewing court's power. In the opinion, 71 S. Ct. at 465, it is stated:

> Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

On the other hand, Congress has not provided for a hearing de novo. The decisions of the Board are entitled to highest respect because of the expert qualifications of its members. In the review of findings of fact, whether within or without its special competence, the courts are not permitted to disturb conclusions supported by substantial evidence in the record considered in its entirety.

The second issue presented by this litigation is whether a report of an administrative trial examiner that is rejected by the Board is to be reviewed as part of the whole record by the courts of appeals. The second circuit court decided that it could not discover from the Taft-Hartley Act nor from the Congressional reports accompanying it exactly what significance the examiner's report was to have. If the court accepted the rejected report as part of the record, it felt that it would be treating the Board's rejection as reversible error. This would be tantamount to according it the force of a master's report, which it felt it could not do in the absence of a definite Congressional directive. On this reasoning the court refused to consider the report as part of the record.

The Supreme Court agreed with the second circuit that Congress did not intend an examiner's report to be of equal force with that of a master; it also agreed that Congressional intent was not discernible from the Taft-Hartley Act alone. However, it asserted that the Taft-Hartley Act must be construed *pari materia* with the Administrative Procedure Act, which in a section dealing with initial examinations and decisions of administrative examiners, declares: "All decisions (including initial, recommended, or tentative decisions) shall become part of the record. . . ." 60 STAT. 242, 5 U. S. C. § 1007(b) (1946). An examiner's report, then, is as much a part of the record as the complaint or the testimony. As the examiner has had the opportunity to observe the witnesses, he is in an excellent position to weigh their credibility according to their demeanor at the hearing. Consequently, the evidence supporting a conclusion of the Board may be significantly less substantial if it appears that the examiner, who heard and observed the witnesses, arrived at a conclusion different than the Board's.

In the future, the courts of appeals must consider the entire record, taking into consideration conflicting evidence which detracts from the evidence supporting the Board's conclusions. Also, the trial examiner's

reports are to be considered part of the record and afforded ". . . the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial." 71 S. Ct. at 469. In the words of Mr. Justice Frankfurter, 71 S. Ct. at 466, the courts must not deem themselves ". . . merely the judicial echo of the Board's conclusion."

Arthur J. Callaghan

CITIZENS—RENUNCIATION OF CITIZENSHIP—NECESSITY OF ANIMUS RENUNCIANDI.—*McGrath et al. v. Tadayasu Abo et al.*, 186 F. (2d) 766 (9th Cir. 1951). In the district court two complaints were filed by some 975 Japanese-Americans who sought a rescission of the renunciation of their American citizenship. Upon motions for inclusion of additional plaintiffs, the number was increased to 4,315. This group was also composed of United States citizens of Japanese ancestry. During World War II, these plaintiffs were incarcerated by the War Relocation authorities at Tule Lake concentration camp, California, in the interests of national security. In the course of their detention they executed formal statements renouncing their American citizenship according to the provisions of the Nationality Act of 1940, 54 STAT. 1168 (1940), as amended, 58 STAT. 677 (1944), 8 U. S. C. § 801(i) (1946). The action in the lower court was initiated upon the allegation that the renunciations were procured under duress and consequently were void. The findings in earlier decisions reveal that due to the non-interference of the United States authorities, Tule Lake became internally controlled by a pro-Japanese faction. *Acheson v. Murakami et al.*, 176 F. (2d) 953 (9th Cir. 1949). Through intimidation, coercion and physical violence this group dominated the political activities of all who were interned there, and induced a majority to seek renunciation of their American citizenship.

In rendering the decrees the lower court held the renunciations of all 4,315 plaintiffs void *ab initio*. Realizing, however, that some of the plaintiffs might have been disloyal in the past, the court granted a ninety day interlocutory decree to allow sufficient time for the Government to introduce any substantial evidence which it might have against particular plaintiffs to show that they had renounced voluntarily. The United States introduced evidence against certain plaintiffs which was rejected by the court and judgment was entered for all the plaintiffs. On appeal the court reversed the judgments for the plaintiffs challenged by the Government, with the exception of one group, and remanded the causes.

While the incarceration of Japanese-Americans during World War II has already had considerable repercussions in the federal courts,

the instant case gives rise to another perplexing question—must an actual intent to expatriate oneself exist if there is an overt act of expatriation?

One of the earliest decisions involving this problem was *MacKenzie v. Hare et al.*, 239 U. S. 299, 36 S. Ct. 106, 60 L. Ed. 297 (1915), in which the plaintiff sought a writ of mandamus to compel California election officials to register her as a qualified voter. The defendant's refusal was predicated upon the ground that the plaintiff had married a British subject—even though she intended to permanently reside in California—and thereby had lost her nationality. This situation was governed by the statutory enactment that "any American woman who marries a foreigner shall take the nationality of her husband." 34 STAT. 1228 (1907). In brushing aside the plaintiff's plea that there was no intention to expatriate herself, the Court declared, 239 U. S. at 312: "It [plaintiff's marriage] is as voluntary and distinctive as expatriation and its consequence must be considered as elected." In *Savorghan v. United States et al.*, 338 U. S. 491, 70 S. Ct. 292, 94 L. Ed. 287 (1950), the plaintiff married an Italian citizen who was serving as Italian vice consul at St. Louis, Missouri. Before exchanging vows, the plaintiff was informed that she would have to become an Italian citizen because of the intended groom's official position. Accordingly, she signed a document in Italian, which she could not read, renouncing her American citizenship and swearing allegiance to the King of Italy. Although the district court found as a matter of fact that the prospective bride intended to obtain Italian citizenship, it held, nevertheless, that she had no intention of abjuring her American citizenship. To this the Supreme Court replied, 338 U. S. at 500:

> There is nothing, however, in the Act of 1907 that implies a congressional intent that, after an American citizen has performed an overt act which spells expatriation under the wording of the statute, he, nevertheless, can preserve for himself a duality of citizenship by showing his intent . . . to have been contrary to the usual legal consequences of such an act.

Whether the overt act of expatriation is conclusive evidence of one's intention has produced a diversity of opinion. In one case, *Doreau v. Marshall,* 170 F. (2d) 721, 724 (3d Cir. 1948), there is the admonition that:

> . . . the forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress . . . [but] Duress as we see it is a defense to expatriation.

This trend can likewise be deduced from *Dubonnet v. Marshall,* 80 F. Supp. 905 (D. D. C. 1948), where the court refused to rescind the plaintiff's renunciation which became effective when she became a French national during World War II. At that time the plaintiff was

aiding in the transportation of French and English prisoners of war from German war camps to Parisian hospitals under the guise of a French national. When the internal conditions of France became strained she was advised to apply for French citizenship so that the French police could render her protection as a Frenchman. Despite the renunciant's claim that she always considered herself an American citizen, the court maintained that the mere fact that she may have feared the Gestapo was not sufficient grounds for relief. This rationale was also applied in *Kazdy-Reich v. Marshall,* 88 F. Supp. 787 (D.D.C. 1950), where the plaintiff, wife of a Hungarian citizen known for his opposition to the Communists, voted in the Hungarian elections of 1945, and thereby repudiated her American citizenship. See Nationality Act of 1940, § 401(e), *supra.* Plaintiff contended that she had been listed as a voter and feared that any inaction on her part might have proved detrimental to herself and to her husband. This, she maintained, was due to the overwhelming majority of Communists in Hungary. Nevertheless the court held, 88 F. Supp. at 788, " . . . the fact that she went to the polls and voted against the Communists indicates a free will rather than the contrary." *Contra: Schioler v. United States et al.,* 75 F. Supp. 353 (N. D. Ill. 1948), *aff'd,* 175 F. (2d) 402 (7th Cir. 1949). While one may agree that expediency based upon a misdirected motive should not be grounds for a rescission of one's expatriation, the expediency in the last two cases discussed does not fall under that category. Obviously, the courts here have only concerned themselves with the concept of duress *per vigorem* (physical), and disregarded duress *per minas* (mental) which, of course, can have equal effect.

On the other hand, the courts have recognized the disparity between intention and act where the renunciation resulted from American citizens entering the service of foreign armies. Nationality Act of 1940, § 401(c), *supra.* In *Podea v. Acheson,* 179 F. (2d) 306 (2d Cir. 1950), the plaintiff, a United States citizen by birth—though born of alien parents—was taken to Roumania in his childhood by his parents. In 1934 the Roumanian authorities called him for military service but granted him a two-year scholastic deferment. Prior to 1934, the plaintiff had applied for a passport to America from the American Consulate and at that time took the oath of allegiance to the United States. When he informed the Consulate of his military registration, they answered with an erroneous ruling that because his father was registered as a Roumanian, he (plaintiff) had lost his American citizenship. Rejected again in 1936 by the Consulate, he was inducted into the Roumanian Army in 1937 for one year, and again in 1941. By virtue of his marriage to an American, he gained entrance to the United States in 1942. In settling this litigation, the court held, 179 F. (2d) at 309:

> It seems most technical to hold that the plaintiff did not act under duress. In our opinion he never voluntarily expatriated himself by taking an oath of allegiance to Roumania or by serving in the Roumanian army. Both steps were . . . primarily caused by erroneous advice of the State Department. . . .

This recognition of involuntary expatriation, despite the performance of the overt act of renunciation, also was judicially explained in In re *Gogal,* 75 F. Supp. 268 (W. D. Pa. 1947). The plaintiff had been taken to Czechoslovakia as a child, but when he reached military age the police forcibly delivered him to the military authorities for service. The court held that since no oath of allegiance had been taken, no voluntary renunciation resulted. *Accord: Dos Reis* ex rel. *Camara v. Nicolls,* 161 F. (2d) 860 (1st Cir. 1947); *Ishikawa v. Acheson,* 85 F. Supp. 1 (D. T. Hawaii), *motion for new trial granted,* 90 F. Supp. 713 (D. T. Hawaii 1949); *United States* ex rel. *Baglivo v. Day,* 28 F. (2d) 44 (S. D. N. Y. 1928).

How then are these "military cases" distinguishable from *Dubonnet v. Marshall, supra,* and *Kazdy-Reich v. Marshall, supra?* Apparently the only differentiating factor is the likelihood of physical coercion, duress *per minas* being entirely disregarded.

In contradistinction to these decisions are two recent cases which also involved United States citizens of Japanese ancestry. Jurisdiction by the federal courts was acquired under section 401(e), Nationality Act of 1940, *supra,* which states that:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> . . .
>
> (e) Voting in a *political election* in a foreign *state* or participating in an election or plebiscite to determine the sovereignty over foreign territory. . . . [Emphasis supplied.]

In *Hatsuye Ouye v. Acheson,* 91 F. Supp. 129 (D. T. Hawaii 1950), the plaintiff, an American of Hawaiian birth, was taken to Japan at the age of six. She remained there throughout the war and was deemed to have expatriated herself when she voted in the 1946 general elections in Japan. She answered the accusation of expatriation by averring that she was under pressure of "social compulsion of the community" and feared the loss of her rations as well as other punishment. In addition, she asserted she was influenced and induced to vote by General MacArthur's Headquarters, and in so doing, she believed her allegiance to the United States would be recognized. The sympathetic court in holding for the plaintiff characterized her, 91 F. Supp. at 130, as ". . . a simple young woman . . . with little knowledge of political activities. . . .," and decreed, 79 F. Supp. at 131, that, "the plaintiff's voting was not the result of free and independent choice. . . . The benefits of citizenship can be renounced . . . only as the result of free and intelligent choice. . . ." Within the shadow of this ruling is *Kuniyuki v. Acheson,* 94 F. Supp. 358 (W. D. Wash.

1950), where in a meticulous decision, it was determined that even though the plaintiff had cast her vote in both the 1946 and 1947 elections in Japan, section 401(e) of the Nationality Act of 1940 did not apply. The reasoning was that Japan was not a foreign state in the true sense of the word since it was subject to American control, and that the elections were not truly political elections, in that all the candidates had been screened by MacArthur's headquarters. Further, the court reasoned that the plaintiff had voted involuntarily for substantially the same reasons as appeared in *Hatsuye Ouye v. Acheson, supra.*

From these cases, then, the question to be answered in future litigation would seem to be whether the courts should look beyond the overt act of expatriation and determine if the renunciant's intention was to forsake his nationality. While no quarrel exists with the principal case, where duress *per vigorem* was correctly recognized, the courts must still establish a consistent rule for those cases where duress *per minas* exists.

Thomas Meaney, Jr.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE TAXATION OF INTERSTATE SALES.—*Norton Co. v. Department of Revenue of State of Illinois,* 340 U. S. ...., 71 S. Ct. 377, 95 L. Ed. *329 (1951). The petitioner, a Massachusetts manufacturer, maintained a branch office in Illinois. An inventory of goods was kept there for over-the-counter sales. For customers desiring articles not kept in stock at the branch office, orders were received and forwarded to the main office to be approved and filled. These orders were shipped either directly to the buyer or through the branch office. Illinois buyers also placed orders directly with the main office, receiving either direct shipments or shipments through the branch office in return. The Illinois Department of Revenue subjected the proceeds of all of these operations to the Illinois Sales Tax, which is computed on the gross receipts of a ". . . person engaged in the business of selling tangible personal property at retail *in the State.* . . ." [Emphasis supplied.] ILL. REV. STAT. c. 120, § 441 (1949). The petitioner brought certiorari, contesting a decision of the Supreme Court of Illinois in favor of the Department of Revenue.

The Supreme Court, in the principal case, affirmed the decision insofar as it upheld the inclusion as taxable income of the proceeds from local sales; from sales from orders received by the branch office although filled directly from the main office; and from sales on direct order to the main office, but shipped through the branch office. But the judgment was vacated on the ground that orders sent directly to

the main office, and shipped directly back to the buyer were interstate in nature and not taxable by Illinois. Justice Reed dissented in part, arguing that orders sent through the branch office but filled by direct shipment to the buyer were interstate in nature because title passed in Massachusetts, and hence not taxable by Illinois. Justices Clark, Douglas and Black joined in a dissent on the ground that the magnitude of the branch office's operations was a decisive factor in inducing direct-order, direct-return sales, and that the taxpayer failed to meet the burden of proving that those sales were dissociated from local business. Thus, they were properly taxable by Illinois.

The issue was whether a state tax, to which a foreign seller is subject because it maintains a branch office within the state, is repugnant to the Commerce Clause if the tax is imposed on the proceeds of all sales in which the branch office is in any way connected. The Court found a sufficient incident upon which to impose the tax if *either* the order is placed through the branch office *or* the shipment received through it.

The Commerce Clause of the Constitution provides that the Congress shall have the power "To regulate commerce with foreign nations, and among the several States. . . ." U. S. CONST. Art. I, § 8. In *Brown v. Maryland,* 12 Wheat. 419, 441-2, 6 L. Ed. 678 (U. S. 1827), Chief Justice Marshall devised the "original package" doctrine, the first test to be applied in litigation of the repugnancy of a state tax to interstate commerce:

> . . . when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

This doctrine was later modified by the interpretation that "imports" meant goods from another country, and not from another state, and also that interstate commerce is subject to state taxation so long as it is non-discriminatory. *Woodruff v. Parham,* 8 Wall. 123, 19 L. Ed. (U. S. 1869). The "original package" doctrine, as a principle governing all interstate commerce tax issues, was finally disposed of by *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538 (1904), which approved taxation of goods still in the original package after they had reached their destination and were held for sale in the state.

The next important standard applied by the Court was the "direct-indirect" test, the gist of which was that a state tax might not directly burden interstate commerce, but a tax that only indirectly affected the profits or returns from such commerce was permissible. *Cooney et al. v. Mountain States Telephone & Telegraph Co.,* 294 U. S. 384, 55 S.

Ct. 477, 79 L. Ed. 934 (1935); *Wiloil Corp. v. Pennsylvania,* 294 U. S. 169, 55 S. Ct. 358, 79 L. Ed. 838 (1935); *Monamotor Oil Co. v. Johnson et al.,* 292 U. S. 86, 54 S. Ct. 575, 78 L. Ed. 1141 (1934); *DiSanto v. Pennsylvania,* 273 U. S. 34, 47 S. Ct. 267, 71 L. Ed. 524 (1927); *Atlantic Coast Line R. R. et al. v. Daughton et al.,* 262 U. S. 413, 43 S. Ct. 620, 67 L. Ed. 1051 (1922); *Underwood Typewriter Co. v. Chamberlain,* 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920); *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135 (1918); *Galveston, H., & S. A. Ry. et al. v. Texas,* 210 U. S. 217, 28 S. Ct. 638, 52 L. Ed. 1031 (1908). Many of the decisions during this period were applying the direct-indirect test while using such terms as non-discriminatory, undue burden, or excessive burden as substitutes for it. *Sonneborn Bros. v. Cureton et al.,* 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095 (1923). Justice Cardozo attempted to clarify the meaning of these vexatious terms when he stated: "Nice distinctions have been made at times between direct and indirect burdens. They are irrevelant when the avowed purpose of the obstruction . . . is to suppress or mitigate the consequences of competition between the states." *Baldwin v. Seelig,* 294 U. S. 511, 522, 55 S. Ct. 497, 79 L. Ed. 1032 (1935).

In 1938, a new formula found its expression in the words "multiple taxation," *i.e.,* a tax is invalid if it places on commerce burdens capable of being imposed with equal right by every state which the commerce touches. *Western Live Stock et al. v. New Mexico Bureau of Revenue et al.,* 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1938); *accord, Gwin, White & Prince, Inc. v. Henneford et al.,* 305 U. S. 434, 59 S. Ct. 325, 82 L. Ed. 272 (1939); *Adams Mfg. Co. v. Storem et al.,* 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 (1938). *Cf. McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940). The Court was careful in the *Adams* case to point out that this "double tax burden" could easily be resolved by an apportionment of the receipts into non-taxable interstate commerce and taxable intrastate commerce, thereby avoiding the interdiction against a tax levied on gross receipts. The same idea was expressed in *Gwin, White & Prince, Inc. v. Henneford et al., supra,* 305 U. S. at 441: "For half a century . . . it has not been doubted that state taxation of local participation in interstate commerce measured by the entire volume of the commerce is likewise foreclosed." See also *Central Greyhound Lines, Inc. v. Mealey et al.,* 334 U. S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948); *Joseph et al. v. Carter & Weekes Stevedoring Co.,* 330 U. S. 422, 67 S. Ct. 815, 91 L. Ed. 993 (1947).

The *Berwind-White* decision, *supra,* 309 U. S. at 49, placed much emphasis on the "taxable incident"; that is, where the taxable incident occurred in the *state of the buyer,* it could not be the subject

of a tax in any other state. ". . . transfer of possession to the purchaser within the state . . . is the taxable event regardless of the time and place of passing title. . . ." This new answer to the problem was an ostensible attempt to circumvent the old formulas to enable the state to tax that which was clearly interstate in character. See *International Harvester Co. et al. v. Dep't of Treasury et al.*, 322 U. S. 340, 64 S. Ct. 1019, 88 L. Ed. 1313 (1944); *McLeod v. J. E. Dilworth Co. et al.*, 322 U. S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944); *McGoldrick v. Felt & Tarrant Mfg. Co.*, 309 U. S. 70, 60 S. Ct. 404, 84 L. Ed. 584 (1940).

The Court has shown the tendency, in recent cases, to use the "multiple taxation" test to the exclusion of all others formerly employed. See *Interstate Oil Pipe Line Co. v. Stone*, 337 U. S. 662, 69 S. Ct. 1264, 93 L. Ed. 1613 (1949); *Ott et al. v. Mississippi Valley Barge Line Co. et al.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585 (1949).

In the present case, the Court allowed taxation of one phase of the petitioner's transactions which was clearly interstate in character. No recourse was made to the language of former decisions which adopted "apportionment," "directness," or other word formulas. Nor was there mention of a possible multiple tax burden. The holding was predicated solely on the fact that the presence of the petitioner's local retail outlet was sufficient to attribute all income derived from Illinois sales to that outlet. An enterprise ". . . cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business." 71 S. Ct. at 381. Ostensibly, if it appears that any portion of the taxpayer's business is intrastate, the "taxable incident" theory will be invoked to uphold state taxation, of otherwise doubtful validity, of interstate operations merely incidental to local sales. If this assumption is correct, the recent decision in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. ...., 71 S. Ct. 508, 95 L. Ed. *435 (1951), where the state tax was struck down upon a finding that no part of the taxpayer's business was intrastate, is distinguishable from the principal case.

Richard John Audino

CONTRACTS—RESCISSION FOR MISREPRESENTATION—NECESSITY OF INJURY.—*Earl v. Saks & Co.*, ... Cal. (2d) ...., 226 P. (2d) 340 (1951). The donor, relying upon the misrepresentation of the seller that the price of a fur coat was reduced from $5,000 to $4,000, purchased the coat for a gift. He was unaware of a collusive pact between the seller and donee in accordance with which the donee paid the amount of the supposed reduction. The donor sought rescission,

and the California Supreme Court, in granting relief, held that the donor received something substantially different from that for which he contracted in that the seller delivered an incomplete gift. The donor had intended to buy a gift entirely paid for by himself.

The instant case presents two questions of which the first is settled and the second problematical. First, is injury a pre-requisite for rescission of contract on grounds of misrepresentation? And secondly, if so, what is the minimum injury for which a rescission will be granted?

The "no injury, no rescission" formula bespeaks the general rule, *Russell v. Industrial Transp. Co.*, 113 Tex. 441, 258 S. W. 462 (1924), but it admits of distinct exceptions in a body of cases in which the question of injury is disregarded. In these decisions, the courts acted under the doctrines of mutual assent and undisclosed principal. If a party misrepresents his identity, the contract is voidable. *Rodliff et al. v. Dallinger*, 141 Mass. 1, 4 N. E. 805 (1886); *Vaiden v. Rudolph*, 145 N. Y. Supp. 55 (S. Ct. 1913); 5 WILLISTON, CONTRACTS § 1518 (Williston and Thompson ed. 1937). A person contracting with an agent of an undisclosed principal may rescind if the agent conceals a principal with whom the person would not have negotiated. *Morrow v. Ursini et al.*, 96 Conn. 219, 113 Atl. 388 (1921); *Cohn v. Knabb*, 105 Wash. 363, 177 Pac. 794 (1919); RESTATEMENT, AGENCY § 304 (1933). Rescission may be granted where a person represents himself as an agent when, in fact, he is acting for himself. *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101 (1895).

Rescission may be denied on the basis of rectification rather than because of the insufficiency of the injury. Concealment of a lien upon land was not ground for rescission when the lien was satisfied before trial. *Callaway v. Chrestman*, 269 S. W. 908 (Tex. Civ. App. 1925). Rescission was denied when the principal ratified acts of his agent that had been beyond the scope of his authority. *Billingsley v. Benefield*, 87 Ark. 128, 112 S. W. 188 (1908); *accord, Jakway v. Proudfit*, 76 Neb. 62, 109 N. W. 388 (1906).

Five days after the instant case was decided a district court of appeals of California denied rescission where the seller had misrepresented the length of a lot by approximately ten feet. It was not proved to the satisfaction of the court that the buyer was induced to buy in reliance on the fraud, nor that the misrepresentation was of a fact so material that an injury could be implied. *Bramaric et al. v. Churich*, ... Cal. App. (2d) ...., 226 P. (2d) 657 (1951). The dividing line between legally sufficient injuries and legally inadequate injuries lies somewhere within the narrow span between the principal case and *Bramaric et al. v. Churich, supra.* In order to approximate a distinction, the cases must be classified as: (1) transactions where there

is a misrepresentation of physical characteristics of the subject matter; and (2) transactions where there is a misrepresentation of something incidental or collateral to the subject matter.

In the first group of cases, in which the courts are confronted with situations in which the buyer receives something physically different from what he expected, *e.g.*, an arid plot of land instead of an arable one, rescission is granted or denied according to one or the other of two tests. The strict view was adopted in *Russell v. Industrial Transp. Co., supra,* where it was held that, in addition to proving that the misrepresentation affected the subject matter and was relied upon, pecuniary damage must be shown. *Accord, Baker v. Maxwell et al.,* 99 Ala. 558, 14 So. 468 (1893); *Sieveking et al. v. Litzler,* 31 Ind. 13 (1869); *Lakeside Forge Co. v. Freedom Oil Works Co.,* 265 Pa. 528, 109 Atl. 216 (1920). The other test, which is non-pecuniary, necessitates the showing of a material lack of compliance with the expected performance. Having been shown this, the court will imply an injury. *Sheridan Oil Corporation et al. v. Davidson,* 75 Colo. 584, 227 Pac. 553 (1924); *Magnuson et al. v. Bouck et al.,* 178 Minn. 238, 226 N. W. 702 (1929); *Pennington v. Roberg,* 122 Minn. 295, 142 N. W. 710 (1913); *Nelson v. Carlson,* 54 Minn. 90, 55 N. W. 821 (1893); *Larsen et al. v. Lootens et al.,* 102 Ore. 579, 203 Pac. 621 (1922).

Within the second classification are situations in which the buyer obtains subject matter substantially identical with his expectations, but where there is misrepresentation as to other matters involved in the transaction. The principal case is of this group since the vendee received the fur coat, the exact thing contracted for, but was misled as to other matters touching the transaction.

In the cases granting rescission for misrepresentation of a collateral matter, a test of injury emerges: would the purchase have been made, had not the fraud been practiced? If not, the fraud is material to the transaction and a legal injury is implied. A buyer was able to rescind where the seller induced him to purchase what was said by the seller to be one of two remaining lots left on a city block. In truth it was one of two lots sold. The Delaware court held that ". . . . the incurring of pecuniary obligations as a result of fraudulent representations is in itself an injury . . ." without proving other money damages. *Webster v. Palm Beach Ocean Realty Co.,* 16 Del. Ch. 15, 139 Atl. 457, 459 (1927). In another case, sufficient injury was done when the seller represented that the law books purchased were the only ones of their kind in the vicinity when, in fact they were not. *Edward Thompson Co. v. Schroeder,* 131 Minn. 125, 154 N. W. 792 (1915). On the other hand, where a subscription to corporate stock was induced by misrepresentations that a named person, in whose judgment the proposed subscriber had special con-

fidence, desired and advised the subscription and would himself be personally connected with the business, the court held that mere reliance on the representations was sufficient injury to justify rescission. *Vulcan Fire Ins. Co. v. Jorgensen,* 33 Cal. App. 763, 166 Pac. 835 (1917). See also *Fuhrman v. American Nat. Building & Loan Ass'n et al.,* 126 Cal. App. 202, 14 P. (2d) 601 (1932); *Farrell v. Miramar Hotel Co. et al.,* 125 Cal. App. 623, 13 P. (2d) 945 (1932); *Brett et al. v. Cooney et al.,* 75 Conn. 338, 53 Atl. 729 (1902); *Higbee v. Trumbauer,* 112 Iowa 74, 83 N. W. 812 (1900); *Fawkes v. Knapp,* 138 Minn. 384, 165 N. W. 236 (1917); *Meinershagen v. Taylor et al.,* 169 Mo. App. 12, 154 S. W. 886 (1913); *Stillwell v. Rankin,* 55 Mont. 130, 174 Pac. 186 (1918); *Jahn v. Reynolds et al.,* 155 App. Div. 647, 101 N. Y. Supp. 293 (2d Dep't 1906); *J. I. Case Threshing Mach. Co. v. Webb,* 181 S. W. 853 (Tex. Civ. App. 1915).

The cases denying rescission tend to show what the minimum injury is not, rather than what it is. A seller contracted to deliver 225 white-faced lambs from the next year's herd. Not having enough to fill the order, he bought some of like quality and breed to fulfill the contract. The buyer's suit for rescission was denied because there was substantial performance, both legally and physically. *Mason v. Madson,* 90 Mont. 489, 4 P. (2d) 475 (1931). Where the buyer bought a one-tenth interest in a patent relying on the seller's representation that certain persons were buying the remaining portions, but those interests were sold instead to other persons of equal prominence, the court denied rescission on the ground that it was a mere moral wrong unaccompanied by injury. *Bomar v. Rosser,* 131 Ala. 215, 31 So. 430 (1901). Rescission is denied unless the seller's misrepresentations are an operative factor inducing the buyer to change his position. *Miller v. Williamson,* 128 Wash. 124, 222 Pac. 201 (1924). Speculative, conjectural, or contingent damages are not sufficient. *Darrow v. Houlihan et al.,* 205 Cal. 771, 272 Pac. 1049 (1928); *Wolcott v. Wise,* 75 Ind. App. 301, 130 N. E. 544 (1921); *Southwestern Surety Ins. Co. of Oklahoma et al. v. Ferguson,* 131 S. W. 662 (Tex. Civ. App. 1910).

The rule to be drawn from the cases seems to be that when the misrepresentation relates to the subject matter, rescission will not be granted for a mere abstract or moral injury. When the misrepresentation relates to some collateral matter, rescission will depend upon whether the buyer would have entered into the transaction but for the seller's statement. In the principal case, the court might well have said that since the transaction would not have been entered into had the buyer known the true state of facts, a legal injury would be

implied upon which to grant the rescission. This is eminently more logical than to say that one who bargains to fully pay for a coat, but is charged for only part of the price, has received something substantially different.

Richard R. Murphy

DOMESTIC RELATIONS—HUSBAND AND WIFE—WIFE'S RIGHT TO RECOVER FOR PERSONAL INJURIES INDEPENDENT OF HUSBAND'S RIGHT OF ACTION FOR LOSS OF SERVICES.—*McGilvray v. Powell 700 North, Inc.*, 186 F. (2d) 909 (7th Cir. 1951). A plate glass window was blown out of the front of defendant's store, striking the plaintiff. As a result, she incurred personal injuries for which she brought an action for damages. The plaintiff's husband joined in the action, seeking damages for loss of his wife's services. The verdicts rendered were in favor of the wife and against the husband; the defendant appealed on the ground that the verdicts were inconsistent and should be set aside.

The court held that since the cause of action of a married woman for personal injuries is independent of her husband's cause of action for loss of her services, irrespective of whether the actions were joined or brought separately, the verdicts rendered were not inconsistent.

Modern statutes permit a married woman to sue in her own name in a tort action; at the same time, by the weight of authority, the husband retains his common law right of action for the loss of his wife's services. *Lansburgh & Bro., Inc. v. Clark*, 127 F. (2d) 331 (D. C. Cir. 1942); *Mattfeld v. Nester*, 226 Minn. 106, 32 N. W. (2d) 291 (1948); *Milde v. Leigh*, 75 N. D. 418, 28 N. W. (2d) 530 (1947).

The court pointed out that a married woman's right to recover damages for personal injuries and her husband's right to recover damages for the loss of her services are separate, distinct, and independent causes of action though stemming from the same injury. *Lansburgh & Bro., Inc. v. Clark, supra; Indianapolis & M. Rapid Transit Co. v. Reeder*, 42 Ind. App. 520, 85 N. E. 1042 (1908); *Duffee v. Boston Elevated Ry.*, 191 Mass. 563, 77 N. E. 1036 (1906); *Mattfeld v. Nester, supra; Blanford v. St. Louis Public Service Co.*, 199 S. W. (2d) 887 (Mo. App., St. Louis 1947); *Poulos v. Coast Cities Coaches, Inc.*, 16 N. J. Misc. 156, 198 Atl. 372 (Dist. Ct. 1937); *Milde v. Leigh, supra; Kraut v. Cleveland Ry.*, 132 Ohio St. 125, 5 N. E. (2d) 324 (1936); *Fulcomer v. Pennsylvania R. R.*, 141 Pa. Super. 264, 14 A. (2d) 593 (1940); *Priester v. Southern Ry. et al.*,

151 S. C. 433, 149 S. E. 226 (1929); *Gilman v. Gilman,* 115 Vt. 49, 51 A. (2d) 46 (1947); *Selleck v. Janesville,* 104 Wis. 570, 80 N. W. 944 (1899).

Secondly, a judgment for or against one of them is no bar to a subsequent action by the other. *Lansburgh & Bro., Inc. v. Clark, supra; Blakewood v. Yellow Cab Co. et al.,* 61 Ga. App. 149, 6 S. E. (2d) 126 (1939); *Indianapolis & M. Rapid Transit Co. v. Reeder, supra; Louisville & N. R. R. v. Kinman,* 182 Ky. 597, 206 S. W. 880 (1918); *Erickson v. Buckley,* 230 Mass. 467, 120 N. E. 126 (1918); *Biczan v. Weil et al.,* 137 Misc. 517, 243 N. Y. Supp. 740 (S. Ct. 1930); *Milde v. Leigh, supra; Kraut v. Cleveland Ry., supra; Walker v. Philadelphia,* 195 Pa. 168, 45 Atl. 657 (1900); *Brierly v. Union R. R., 26* R. I. 119, 58 Atl. 451 (1904); *Cook v. Atlantic Coast Line R. R. et al.,* 196 S. C. 230, 13 S. E. (2d) 1 (1940); *Gilman v. Gilman, supra.* In other words, the disposition of the wife's claim does not affect the husband's action, since a judgment for or against the wife is not conclusive as to the husband.

The reasons given for the majority view are well founded. The causes of action and the parties to the actions are not the same, nor is there privity between the husband and wife in asserting their respective demands. The husband could not institute or control an action in behalf of his wife since the right is vested solely in her. Moreover, the wife's judgment is her separate and exclusive property.

When the husband seeks damages for loss of his wife's services, he sues in his own right, his wife having no right to release or control his claim; and since the husband is neither a necessary nor a proper party to his wife's suit, he cannot recover his damages in her individual suit. *Laskowski v. People's Ice Co.,* 203 Mich. 186, 168 N. W. 940 (1918); *Womach v. City of St. Joseph,* 201 Mo. 467, 100 S. W. 443 (1907). Procedurally, since a husband has no opportunity to defend or appeal the decision of his wife's action, he is not bound by the disposition of it. The natural conclusion to be drawn from the cases is, therefore, that the doctrine of res judicata does not apply.

The minority view, on the other hand, holds that the husband's damages are consequential, and that since an action for consequential damages stands no better than its principal case, where the principal falls, the consequential falls. *Hinckley v. Capital Motor Transp. Co.,* 321 Mass. 174, 72 N. E. (2d) 419 (1947). Thus where the wife is not entitled to recover for personal injuries, her inability precludes her husband's right to recover for the loss of her services. *Shaw v. Boston American League Baseball Co.,* .... Mass. ...., 90 N. E. (2d) 840 (1950); *Folley v. United Building & Loan Ass'n of Hackensack,*

13 N. J. Misc. 293, 178 Atl. 95 (S. Ct. 1935); *Stuart v. Winnie et al.*, 217 Wis. 298, 258 N. W. 611 (1935).

This theory is exemplified in cases holding that if the wife is contributorily negligent, her negligence is imputed to her husband so as to bar his recovery. *Chicago, B. & Q. R. R. v. Honey*, 63 Fed. 39 (8th Cir. 1894); *Friedman et al. v. Beck et al.*, 250 App. Div. 87, 293 N. Y. Supp. 649 (1st Dep't 1937); *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N. W. 198 (1925).

Divergence of opinion within the same jurisdiction is not lacking on this question of law. For instance, there is a patent conflict between two New York cases. In *Biczan v. Weil et al., supra,* the Supreme Court of New York, Trial Term, held that because there was no identity of parties, the actions were separate. On the other hand, the Appellate Division, in *Maxson v. Tomek et al.*, 244 App. Div. 604, 280 N. Y. Supp. 319 (4th Dep't 1935), held that any right the husband had was necessarily derived from the right of the wife.

The Supreme Court of Wisconsin originally held that the husband's cause of action was not one which initially belongs to the wife and then is transferred to the husband. *Selleck v. Janesville, supra.* Yet, in *Callies v. Reliance Laundry Co., supra,* the same court later held that the law assigned to the husband a part of the wife's cause of action, and that being an assignee, the husband took his claim subject to any defenses valid against the assignor, his wife. Thus, the contention that the actions of the husband and wife are separate and distinct was denied.

In Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 U. OF CHI. L. REV. 173 (1935), the *Callies* case was analyzed in detail with the author concluding that the result reached by the Wisconsin court was manufactured, the court having made up its mind as to how to decide the case, and then rationalized to its decision.

The principal case stands with the weight of authority. The rule expressed by the court is based on logic and reason, particularly in view of modern societal conditions where a husband and wife have a far greater individuality than they did centuries ago. The actions brought by each are for distinct injuries, and merely because permissible joinder of the causes is allowed, a verdict in favor of one should not be set aside on the grounds of inconsistency because the defendant was not found liable to the other. To allow the verdict to be so set aside would only result in eliminating joinder. If the husband and wife brought independent suits, inconsistent verdicts could not be set aside unless the court ruled that the first judgment obtained was controlling. This would amount to declaring that the first was res judicata, a declaration which few, if any, courts would make.

Finally, it must be realized that the defendant has only appealed the verdict that went against him. As suggested by the court in *Lansburgh & Bro., Inc. v. Clark, supra,* 127 F. (2d) at 333, there is no reason for setting the appealed verdict aside because there is no showing that it was the incorrect one.

Robert L. Berry

FEDERAL STATUTES—ANTI-ASSIGNMENT STATUTE—VALIDITY OF VOLUNTARY ASSIGNMENT OF CLAIMS AGAINST THE UNITED STATES.—*United States v. Shannon et al.,* 186 F. (2d) 430 (4th Cir. 1951). The United States leased from a Mrs. Boshamer and others a tract of land, remaining in possession under the lease from 1943 to 1947. In 1946, Mrs. Boshamer, together with the other owners, executed a deed of the land to the appellees, subject to the lease then existing in favor of the United States, which purported to transfer to the vendees any claim of the vendors upon the United States for damages to the land and the adjoining buildings. The three parties—the United States through its agents, the vendors, and the vendees—then entered into a written agreement which, among other things, contained a release of the United States from any damage claims by the vendors, and an assignment of these claims to the vendees. At the termination of the lease in 1947, the agents of the United States obtained another release of all damage claims from the vendors. Not until this second release did the Government raise any question as to the validity of the assignment.

In this suit brought by the vendees, the court held, with one judge dissenting, that the assignee of a voluntarily assigned claim against the United States can assert that claim in an action against the United States despite the positive bar of the Federal Anti-Assignment Statute, REV. STAT. § 3477 (1875), 31 U. S. C. § 203 (1946), where justice demands and the purposes for which the statute was enacted do not forbid. Though paying lip-service to the Anti-Assignment Act, and even stating that the instant assignment fell within its terms, the court circumvented the statute, and allowed a claim which had been voluntarily assigned to be asserted by the assignee against the United States.

The court declared, 186 F. (2d) at 434, that the assignee had no right to sue in law, but that the relief granted was entirely equitable, establishing no precedent that might lead to the evils that the statute was designed to prevent. The facts which the court found compositely material to demand equitable relief were that: (1) it was a fair assumption that the agents of the Government allowed the parties to act under a mistake of law that the assignment was valid; (2) the

parties had acted in good faith; (3) all the interested parties were before the court, and would be bound; and (4) the Government could assert any defenses or counterclaims that it ever had or would have. In short, recovery did not violate the purpose for which the Act was designed—that the Government be compelled to choose between adverse claimants and be subjected to multiple suits. Moreover, there was an element of fault upon the Government in allowing the present situation to arise. Throughout the case the court referred to the basic equitable grounds for relief of undue hardship and unconscionable acts.

The purpose of the statute, as evidenced by its title, is ". . . to prevent Frauds upon the Treasury of the United States." 10 STAT. 170 (1853). The language of the Act is all-inclusive. It declares null and void all assignments of claims against the United States unless properly witnessed and made after the allowance of the claim by the United States and the issuing of a warrant for the sum determined to be due.

The early interpretation given by the courts paralleled in strictness the language of the Act itself. It was held that the assignee of a claim against the United States acquired no interest whatsoever by reason of the assignment, either against the United States, *United States v. Gillis,* 95 U. S. 407, 24 L. Ed. 503 (1877), or against the assignor, *Spofford v. Kirk et al.,* 97 U. S. 484, 24 L. Ed. 1032 (1878). The Court in the *Spofford* case stated, 24 L. Ed. at 1034, that the statute ". . . . strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government for creating an interest in the claim in any other than himself."

But this literal view did not long prevail. An exception to the effect that an assignee of a claim against the Government whose right came to him by operation of law, as distinguished from the voluntary act of the parties, could assert the claim against the United States, was made by the same justices who had decided the *Spofford* case. *Erwin v. United States,* 97 U. S. 392, 24 L. Ed. 1065 (1878). The particular point decided was that the original owner of the claim, who had gone through bankruptcy proceedings, could no longer enforce the claim against the United States, since title to it had passed by operation of law to the assignee in bankruptcy.

Subsequent cases have developed other exceptions embracing assignments by operation of law. Assignments of a claim against the United States by court order, *Western Pacific R. R. v. United States,* 268 U. S. 271, 45 S. Ct. 503, 69 L. Ed. 951 (1925); *Price et al. v. Forrest et al.,* 173 U. S. 410, 19 S. Ct. 434, 43 L. Ed. 749 (1899); *Sherwood v. United States,* 112 F. (2d) 587 (2d Cir. 1940), *rev'd on other grounds,* 312 U. S. 584, 61 S. Ct. 767, 85 L. Ed. 1058 (1941); by a merger of corporations according to state law, *Seaboard Airline*

Ry. v. United States, 256 U. S. 655, 41 S. Ct. 611, 65 L. Ed. 1149 (1921); by subrogation, *United States v. Aetna Casualty & Surety Co.,* 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171 (1949); *United States v. South Carolina State Highway Department,* 171 F. (2d) 893 (4th Cir. 1948); *Amherst et al. v. United States,* 77 F. Supp. 80 (W. D. N. Y. 1948); by the nationalization of the corporate owner of the claim, *Ozanic v. United States,* 83 F. Supp. 4 (S. D. N. Y. 1949); and by a discontinued corporation to its sole stockholder, *Roomberg v. United States,* 40 F. Supp. 621 (E. D. Pa. 1941), have all been held to be assignments by operation of law not barred by the Anti-Assignment Statute.

An exception to the sweeping terms of the Statute also has been made where the litigation concerns only the parties to the voluntary assignment and not the United States. It is now held that the assignee by way of voluntary assignment can assert his claim against the assignor, *California Bank v. United States Fidelity & Guaranty Co.,* 129 F. (2d) 751 (9th Cir. 1942); In re *Pottasch Bros. Co.,* 79 F. (2d) 613 (2d Cir. 1935); against the administrator of the assignor, *Nutt et al. v. Knut et al.,* 200 U. S. 12, 26 S. Ct. 216, 50 L. Ed. 348 (1906); *Goodman v. Niblack,* 102 U. S. 556, 26 L. Ed. 229 (1881); against a subsequent assignee, *Martin v. National Surety Co. et al.,* 300 U. S. 588, 57 S. Ct. 531, 81 L. Ed. 822 (1937); and against the trustee in bankruptcy of the assignor, In re *Webber Motor Co.,* 52 F. Supp. 742 (D. N. J. 1943). *Contra,* as to last named case: *National Bank of Commerce of Seattle v. Downie et al.,* 218 U. S. 345, 31 S. Ct. 89, 54 L. Ed. 1065 (1910); *Guarantee Title & Trust Co. v. First National Bank of Huntingdon, Pa. et al.,* 185 Fed. 373, *aff'd on reargument,* 193 Fed. 52 (3rd Cir. 1911).

Voluntary assignments, however, have consistently been held to transfer no interest to the assignee for purposes of suit against the United States, *Hager v. Swayne,* 149 U. S. 242, 13 S. Ct. 841, 37 L. Ed. 719 (1893), even where the court admitted the injustice of denying recovery, *Emmons v. United States,* 189 Fed. 414 (C. C. D. Ore. 1911). This is the rule which the present case purports to follow but actually circumvents.

To understand the holding of the court in the principal case, an examination of the prime purpose of the statute would not be bootless. The Anti-Assignment Statute in no way ties the hands of the Government. It is left free to utilize the protection afforded by the statute, or to disregard it and give effect to the voluntary assignment. The effect of a waiver of the statute by the United States is that the Government is bound by its action, and sums paid to the assignee of the voluntarily assigned claim cannot be recovered on the ground that the assignment was illegal. The waiver of the statute is final. *McKnight et al. v. United States,* 98 U. S. 179, 25 L. Ed. 115 (1879);

Bank of California, National Ass'n, et al. v. Commissioner of Internal Revenue, 133 F. (2d) 428 (9th Cir. 1943).

The cases developing the various exceptions echo the basic purpose of the statute—to protect the Government only and to give no aid to the parties to the assignment. *Western Pacific R. R. v. United States, supra; Price et al. v. Forrest et al., supra.* Therefore, since assignments by operation of law are not inconsistent with the purpose of the statute, they are not prohibited by it. *United States v. Aetna Casualty & Surety Co., supra.*

Generally, exceptions to the Act are made only where the evils which the statute forbids are not present. The prime evil is the subjection of the Government to conflicting claims by various disputants. *Richmond Screw Anchor Co. v. United States,* 275 U. S. 331, 48 S. Ct. 194, 72 L. Ed. 303 (1928). And this evil may be absent from cases involving voluntary assignments as well as from those in which assignments by operation of law are in issue.

The principal case represents the culmination of the judicial development of exceptions to the Anti-Assignment Statute. The court, though recognizing the force of the statute, has sanctioned a means to effectively avoid it in a case where, by reason of the peculiar circumstances, the attainment of justice demands a recovery. The purpose of the statute—the protection of the Government from conflicting claims—is fully achieved inasmuch as all parties are before the court and are bound by its decision. There remains, then, no valid reason for denying recovery. If assignments by operation of law are excepted under the reasoning that the purpose of the statute is still attained, there is nothing logically to prevent the inclusion of voluntary assignments within the exception where the purpose of the statute is not thwarted.

Joseph F. MacKrell

LABOR LAW—CONFLICT BETWEEN STATE AND FEDERAL REGULATIONS —CONSTITUTIONALITY OF THE WISCONSIN PUBLIC UTILITY ANTI-STRIKE LAW.—*Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America et al. v. Wisconsin Employment Relations Board,* 340 U. S. ...., 71 S. Ct. 359, 95 L. Ed. *383 (1951). The Wisconsin Public Utility Anti-Strike Law, WIS. STAT. §§ 111.50-65 (1949), required compulsory arbitration in public utility labor disputes when collective bargaining reached an impasse. To effectuate the settlement procedure, in the interest of the public, strikes were made unlawful. Petitioner unions represented the employees of the Milwaukee gas and transit companies. When proposed strikes by these unions

threatened to cause an interruption of essential utility services, the Wisconsin Employment Relations Board invoked the provisions of this Act, and all strike activities were enjoined; upon appeal to the Wisconsin Supreme Court, the constitutional challenge of the statute by the unions failed. On review of the important questions presented, Mr. Chief Justice Vinson, speaking for a majority of the Supreme Court of the United States, declared the Wisconsin Act invalid because it denied petitioners the federally-guaranteed right to strike peacefully for higher wages. The Wisconsin Act was found to be in direct conflict with the Labor Management Relations Act of 1947, 61 STAT. 136 *et seq.* (1947), 29 U. S. C. §§ 141 *et seq.* (Supp. 1950), specifically Section 7 of the Act. Justice Frankfurter, joined by Justices Burton and Minton, dissented contending that there was no clear manifestation that Congress intended to deny the states this exercise of their police power, nor that the Wisconsin statute necessarily conflicted with the federal legislation.

The ruling of the instant case dispels some of the uncertainties surrounding previous extensions of federal labor regulation into spheres formerly controlled by the states. See Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950). It also raises contentious questions of policy. See Williams, *The Compulsory Settlement of Contract of Negotiation Labor Disputes,* 27 TEXAS L. REV. 587 (1949). But, in addition to broader considerations of policy implicit in this decision, there is the basic question of whether, in view of the unique circumstances, this is a proper extension of federal authority which actually carries into effect the national labor policy.

Federal jurisdiction over local public utilities is undisputed. These companies supply essential utility services to industries directly engaged in interstate and foreign commerce. *Consolidated Edison Co. et. al. v. NLRB,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126 (1938); *Local Transit Lines,* 2 CCH LAB. LAW REP. (4th ed.) ¶ 10,334 (1950). *But cf. State* ex rel. *Moore et al. v. Julian et al.,* 359 Mo. 539, 222 S. W. (2d) 720 (1949). At the same time, until the passage of the Labor Management Relations Act of 1947, the states were allowed to define and prohibit unfair union activities such as picketing, striking, or whatever form the activity might take. This was obviously consistent with the principles of federal-state relationship which allow the states to meet local problems according to local ideals—the traditional system. There is nothing appearing in the 1947 Act to disrupt this ideal. In fact in section 10(a) of the Act, an effort was made to clarify the federal-state jurisdictional dilemma by a proviso for the cession of jurisdiction to state labor boards where the enterprise is of doubtful interstate character, and where the state law is not inconsistent with federal regulation.

Parallel to this reasoning is another tack which takes account of the fact that the 1947 Act expressly provides in sections 206-10 methods for

handling strikes that are declared to create national emergencies. 61 STAT. 155-6 (1947), 29 U. S. C. §§ 176-81 (Supp. 1950). SEN. REP. No. 105, 80th Cong., 1st Sess. 14 (1947). Are not the states to be similarly allowed to meet local emergencies, such as a utility strike certainly can be? It was to meet local emergencies that the Wisconsin statute and legislation of other states were enacted. See FLA. STAT. §§ 453.01 *et seq.* (1949); IND. ANN. STAT. §§ 40-2401 *et seq.* (Burns Supp. 1949); KAN. GEN. STAT. ANN. §§ 44-601 *et seq.* (1949) (seizure of public utilities by State Labor Commissioner); MASS. ANN. LAWS c. 150 B, §§ 1 *et seq.* (1950); MICH. STAT. ANN. §§ 17.454(1) *et seq.* (Henderson 1950); MO. REV. STAT. ANN. §§ 295.010 et seq. (1949) (seizure by governor); NEB. REV. STAT. §§ 44.801 *et seq.* (Supp. 1947) (court of industrial relations; utility workers considered government employees); N. J. STAT. ANN. §§ 34:13B-1 *et seq.* (Supp. 1950); PA. STAT. ANN. tit. 43, § 213 (Supp. 1950) (compulsory arbitration); TEX. STAT., REV. CIV. art. 1446a (1948); VA. CODE ANN. §§ 40 *et seq.* (1948).

While judicial construction of these statutes is sparse, repercussions from the few decisions have resulted in several amendments and supplementary legislation. The New Jersey court found that the lack of definite standards to guide the arbitration board invalidated the entire act. *State v. Traffic Telephone Workers' Federation of New Jersey et al.*, 2 N. J. 335, 66 A. (2d) 616 (1949). An attempt to confer nonjudicial duties upon a circuit judge by appointing him chairman of the arbitration board was a fatal defect in the original Michigan act. *Transport Workers Union of America, C. I. O., et al. v. Gadola et al.*, 322 Mich. 332, 34 N. W. (2d) 71 (1948). These cases reveal the general condition of flux in labor law and the role of the states in legislative experimentation. *See Traffic Telephone Workers' Federation of New Jersey et al. v. Driscoll et al.*, 72 F. Supp. 499, 504 (D. N.J. 1947).

When faced with the constitutional question of conflicting federal and state policy, the state courts have consistently held that compulsory arbitration of disputes involving utilities is an integral part of the state police power. Emphasis in the cases is on the dominant rights of the public, with most of the constitutional analysis being devoted to these broader considerations rather than the precise question presented in the principal case. The Michigan court discussed state compulsory arbitration in utility cases but reserved decision on this point in *Transport Workers Union of America, C. I. O., et al. v. Gadola et al., supra*, 34 N. W. (2d) at 75-6. It was held to be part of the police power in *State v. Traffic Telephone Workers' Federation of New Jersey et al., supra* 66 A. (2d) at 624-5. The same conclusion was reached when a public utility company challenged the statute on this ground. *New Jersey Bell Tel. Co. v. Communication Workers of America et al.*,

.... N. J. ...., 75 A. (2d) 721 (1950). On March 19, 1951, the Attorney General of Missouri concluded that the Missouri act was unconstitutional, his opinion being based on the rule in the instant case. 4 CCH LAB. LAW REP. (4th ed.) ¶ 49,142 (1951).

The view taken by the state courts on federal-state conflict seems to be reiterated, perhaps with greater intrinsic force of argument, by the dissenting opinion of Justice Frankfurter in *Hill v. Florida,* 325 U. S. 538, 547, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945). There, Florida's attempt to impede collective bargaining and to require unions operating within the state to register, was found to conflict directly with the free exercise of the established federal right of collective bargaining. The dissenting opinion emphatically made clear that the result of the case was a limitation on the state's exercise of its reserved powers. However, since the *Hill* case, despite *dissenting opinions,* the Court has gradually extended the doctrine of federal supremacy in labor relations regulation. When Congress has undertaken regulation in a particular area, states are precluded from doing so, and in the absence of express guides to construction of the federal law, exclusion of state action may be implied from the nature of the legislation. *Bethlehem Steel Co. et al. v. New York State Labor Relations Board,* 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947). This principle was reaffirmed in *La Crosse Telephone Corporation v. Wisconsin Employment Relations Board,* 336 U. S. 18, 69 S. Ct. 379, 93 L. Ed. 463 (1949). These two decisions were authority for a per curiam reversal of the Wisconsin Supreme Court in *Plankinton Packing Co. v. Wisconsin Employment Relations Board et al.,* 338 U. S. 953, 70 S. Ct. 491, 94 L. Ed. 588 (1950). In *International Union of United Automobile, etc. Workers of America, C. I. O., et al. v. O'Brien et al.,* 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. 978 (1950), the Court again asserted that where Congress has protected union activity, conflicting state regulation must yield. There the Court struck down a Michigan statute which attempted to condition the right to strike upon a majority vote of the interested workers employed in Michigan, and which also provided for a different waiting period before striking than did the federal Act.

Where Congress has not protected the union activity or otherwise asserted regulation, states may properly act. *International Union, United Automobile Workers v. Wisconsin Employment Relations Board,* 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651 (1949) (intermittent unannounced work stoppage); *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942) (mass picketing, threats and violence). Viewed in the light of the foregoing decisions, the conclusion in the instant case serves as forceful clarification of the judicial attitude in this perplexing field. See Cox and Seidman, *supra.*

The rationale of any extension of federal authority is the desire to preserve congressional intent—frequently an obscure element. As a national labor policy, compulsory arbitration was considered unsatisfactory. SEN. REP. No. 105, 80th Cong., 1st Sess. 13 (1947); 93 CONG. REC. 3835 (1947). When Congress discarded compulsory arbitration and extended federal regulation upon all industries affecting interstate commerce, it may have contradicted the thesis of protecting public interests in emergency disputes. There appears to be a lapse of this principle at the local emergency level, although it is possible that Congress intended control of national emergencies as the only proper limitation on free collective bargaining. Section 10(a) of the Labor Management Relations Act, of 1947, 61 STAT. 146 (1947) 29 U. S. C. § 160(a) (Supp. 1950), providing for state control where there is no inconsistency with federal law, suggests that Congress is directing a trend towards national uniformity. However, Rep. Hartley in a comment on this problem, 93 CONG. REC. 6383 (1947), stated that his ". . . interpretation of the bill, [is] that [it] will not interfere with the State of Wisconsin in the administration of its own laws." Bills introduced at the recent session of Congress indicate that Congress is still deliberating the issues involved in protecting public interests in utility strikes. See H. R. 2485, 82nd Cong., 1st Sess. (1951); H. R. 2486, 82nd Cong., 1st Sess. (1951).

The Court has reiterated its conclusion that Congress meant to exercise exclusive authority in the field of labor relations, insofar as it has spoken in the Labor-Management Relations Act. One of the rights definitively protected by the federal legislation is the right to strike, which will be upheld in all cases where the Court believes the object of the strike is not unlawful. Just what it will allow the states to declare unlawful is still unknown. To turn for the moment to the related activity of picketing, one sees that the Court has allowed the states to declare picketing unlawful when it violates either statutes or judicially declared policies of the state. *Giboney et al. v. Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949) (picketing in violation of the state antitrust statute); *Building Service Employees International Union, Local 262 et al. v. Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950) (picketing to force an employer to interfere with the employees' choice of a bargaining representative); *Hughes et al. v. Superior Court of California*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950) (picketing to force an employer to hire employees according to race in violation of a state policy against any consideration of race in employment practices); *International Brotherhood of Teamsters, etc., Local 309 et al. v. Hanke et al.*, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950) (picketing to force a union shop upon a self-employer).

But as yet, the Court has seldom, if ever, allowed any state declared unlawfulness to invade the statutory right to strike. This appears to place the statutory right to strike on a higher plane than the constitutionally guaranteed right of free speech—at least in respect to the exercise of the police power by the states. This suggests that a reexamination of the federal-state sphere is in order, so that a state can meet local emergencies—for example, public utility strikes—just as the Taft-Hartley Act allows the Federal Government to protect itself by the national emergency provisions. There appears to be nothing inherently conflicting in the supervision by a state of the labor relations of its public utilities and the regulation of the commerce by the Federal Government.

William J. Hurley

LABOR LAW—PICKETING—SUFFICIENCY OF "UNLAWFUL OBJECTIVE" TO PERMIT INJUNCTION.—*Self et al. v. Taylor,* .... Ark. ...., 235 S. W. (2d) 45 (1950). Appellant, business agent of a union of electrical workers, offered the respondent, an employer, a contract containing a provision for cancellation by either party upon sixty days' notice. The contracts previously in force had been for periods of a year or more. The union's constitution forbade its members from working with non-union men. The employer, who had in his hire several non-union men, refused to sign the contract when told that the union would exercise its right to cancel if he did not discharge them. The union then began picketing the employer's place of business whereupon he instituted suit for an injunction. The court granted the injunction on the ground that if the employer signed the contract he would be violating ARK. CONST. AMEND. XXXIV, § 1, which made it unlawful to enter into a contract to exclude from employment persons who refuse to join a labor union. On appeal the supreme court in the instant case held that the injunction was properly granted, since otherwise the employer would be forced to grant a closed shop or be subjected to endless picketing.

The question raised by this case was whether the state could properly enjoin peaceful picketing where the object was to force the employer to accept a contract which would in effect establish an illegal closed shop.

It is the general rule that states cannot enjoin peaceful picketing when it is for a lawful purpose, *Thornhill v. Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); *Local No. 802 et al. v. Asimos et al.,* 216 Ark. 694, 227 S. W. (2d) 154 (1950), since an injunction in these cases violates the right of free speech guaranteed by the Fourteenth Amendment of the Federal Constitution. But it has be-

come equally well established that even peaceful picketing may be enjoined by the states when it is for an unlawful purpose. *Giboney et al. v. Empire Storage & Ice Co.,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949); *Bakery & Pastry Drivers & Helpers Local 802 et al. v. Wohl et al.,* 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178 (1942).

Cases in which injunctions were issued on this ground fall under two headings: picketing to coerce violation of a statute, and picketing contrary to judicially declared public policy.

Under the first heading, picketing to coerce violation of a statute, the leading case of *Giboney et al. v. Empire Storage & Ice Co., supra,* most aptly and forcefully illustrated the fact that even peaceful picketing may be enjoined by the states if and when it is for an unlawful purpose. There, picketing was enjoined by the Missouri court because its object was to induce the ice company to agree not to sell ice to non-union peddlers. If the union had been successful, it would have forced the company to violate the Missouri antitrust law.

In *Phillips et al. v. United Brotherhood of Carpenters & Joiners of America et al.,* 362 Pa. 78, 66 A. (2d) 227 (1949), manufacturers were picketed by the union because they refused to compel employees to join the union but instead allowed the employees to decide for themselves. The Pennsylvania court enjoined the picketing on the ground that it involved union coercion designed to induce a violation of the state's anti-closed shop statute. *Building Service Employees International Union, Local 262 et al. v. Gazzam,* 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045 (1950), held that picketing to compel an employer to control his employees' choice of bargaining representative was unlawful in that it was an attempt to induce a transgression of the state's policy against coercion of employees. This public policy of the State of Washington had been declared by legislative enactment. In *Kold Kist, Inc. et al. v. Amalgamated Meat Cutters and Butchers Workmen of North America, Local No. 421 et al.,* .... Cal. App. (2d) ...., 221 P. (2d) 724 (1950), the plaintiffs were in the business of selling frozen food. The unions attempted to organize the buyers of these foods in an effort to prevent sale of them after certain hours. These activities were designed toward diminishing the output of the frozen meats of the plaintiffs. California enjoined the picketing because it encouraged a direct violation of an anti-monopoly statute and also was contrary to public policy.

Under the second heading, peaceful picketing has been enjoined by the states when it is contrary to judicially declared public policy. "The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial." *Hughes et al. v. Superior Court of California,* 339 U. S. 460, 466, 70 S. Ct. 718, 94 L. Ed. 985 (1950). This same view

is supported by *International Brotherhood of Teamsters, etc., Local 309 et al. v. Hanke et al.*, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950).

In the *Hughes* case, *supra*, the California court enjoined the picketing of a place of business for the purpose of securing submission to a demand for employment of Negro clerks in proportion to the number of the business's Negro customers, contrary to a policy against consideration of race in hiring practices. In *International Brotherhood of Teamsters, etc., Local 309, et al. v. Hanke et al., supra*, there was picketing of a self-employer's place of business for his refusal to adopt a union shop. It was enjoined on grounds of public policy in favor of self-employers.

These two cases also illustrate that the opinion of the state courts on what is good labor policy will usually be respected by the present United States Supreme Court. As stated in the *Hughes* case, *supra*, 339 U. S. at 467:

> It is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law "to a concrete situation through the authority given . . . to its courts."

In the instant case, the Arkansas court, amplifying and extending the rules laid down in the above two categories, held that picketing for an *indirect* violation of a state statute may be enjoined. In arriving at this decision the court found it necessary to consider compositely, the contract clause picketed for, the union constitution, and testimony of the union representatives.

The basic conflict lies in the right of labor organizations to picket peacefully, which has been called an exercise of freedom of speech, *Thornhill v. Alabama, supra*, and the co-existing right of the state to define and proscribe labor practices which are inimical to the general welfare, as construed by the state. The instant case properly emphasizes that peaceful picketing for an unlawful purpose, however indirect or covert that purpose may be, will not be tolerated. It must be noted, however, that no other court has gone so far in correlating the precise facts to find an "unlawful objective" so as to bring the case within the operation of the *Giboney* rule.

Wallace F. Neyerlin

OIL AND GAS—CONSERVATION—CONSTITUTIONALITY OF OKLAHOMA'S COMPULSORY UNITIZATION ACT.—*Palmer Oil Corp. et al. v. Phillips Petroleum Co. et al.*, ... Okla. ...., 231 P. (2d) 997 (1951). Lessors, lessees, and certain royalty interest owners contested an order of the Oklahoma Corporation Commission providing for the unitized operation of an oil and gas reservoir in Oklahoma. The order was

made pursuant to the Oklahoma Unitization Act, OKLA. STAT. tit. 52, § 286 (Cum. Supp. 1949), authorizing the extraction of minerals from any common source of supply of oil and gas as though it were covered by a single lease. The purpose of the Act was to achieve a greater recovery of oil and gas, and to protect the correlative rights of the owners of interests in them. The contestants did not deny the power of the legislature to place regulations upon oil and gas production to achieve these ends, but they attacked as unconstitutional the methods provided by the Act.

In order to understand the need for unitization a brief review of attempts by the Oklahoma legislature to regulate oil and gas production is appropriate. Until 1933, laissez-faire ruled the oil fields under the guise of the rule of capture. Robinson, *Oklahoma, 1938-1948* in CONSERVATION OF OIL AND GAS 373 (Murphy ed. 1948). An individual was allowed exclusive ownership of as much of these valuable natural resources as he was able to bring to the surface by wells located on his land. The only recourse available to an adjoining landowner seeking to prevent the withdrawal of oil underlying his land was to drill an offset well adjacent to every well near his land. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas,* 13 TEXAS L. REV. 391 (1935). The inevitable result was an oil boom whenever oil was discovered in a locality. This hasty withdrawal of oil caused a considerable amount of physical and economic waste. Jacobs, *Unit Operation of and Gas Fields,* 57 YALE L. J. 1207 (1948). Most of the gas brought to the surface was allowed to escape, leaving the oil remaining underground economically inaccessible. Discovery of any large reservoir also had a disastrous effect upon the market price of oil. It was to prevent these evils that the Oklahoma Legislature began in 1933 to enact a series of statutes culminating in the Unitization Act. Robinson, *supra* at 372.

The first measures employed to control the production of oil were proration and gas-oil ratios. By virtue of a 1933 statute, the Corporation Commission was authorized to limit the production of oil from any reservoir when full production would result in waste. OKLA. STAT. tit. 52, § 87 (1941). Each well was allotted a percentage share of the maximum amount of oil that could be produced without waste from the field. Since the gas pressure in the reservoir was not taken into account in proration, the Corporation Commission also was given authority to establish gas-oil ratios to prevent unreasonable dissipation of the reservoir energy. OKLA. STAT. tit. 52, § 86 (1941).

Though partially effective, these measures fell short of achieving maximum mineral recovery. In order to limit the number and provide for the reasonable spacing of wells, the legislature next passed the Well Spacing Act, OKLA. STAT. tit. 52, § 87 (1941), by which the Corporation Commission was authorized to establish well spacing and drilling

units upon application of eighty percent of the lessees of any common source of oil supply. Since the Commission could limit the number of wells in a unit, the problem of prorating the oil produced naturally resulted. The problem as to landowners with royalty interests in the unit was solved by the Act, which authorized the Commission to require them to share on an acreage basis one eighth of the oil produced. The constitutionality of this provision was sustained in *Patterson v. Stanolind Oil and Gas Co. et al.*, 182 Okla. 155, 77 P. (2d) 83 (1938), *appeal dismissed*, 305 U. S. 376, 59 S. Ct. 259, 83 L. Ed. 231 (1939). The Act did not, however, operate to pool the lessee's interest in the drilling unit. To a large extent the problem of dividing the expense and the profits from the wells remained a matter requiring the agreement of the lessees of each unit. When an agreement was not forthcoming operation of the unit was retarded and lessors, lessees, and the public suffered. Robinson, *supra* at 391.

The authority of the commission was deficient in other respects. For maximum recovery the whole reservoir must be treated as though under one lease. Jacobs, *supra* at 1212. (Under the Well Spacing Act the unit usually embraced only twenty or forty acre tracts.) By disregarding conflicting interests of the various lessees, wells can be placed at the most favorable geological positions and their number limited to the minimum required for adequate extraction from the reservoir; by disregarding the division of land into separate leases the operator also may make use of secondary recovery measures, such as waterflooding or gas repressuring, as a means of salvaging oil otherwise unobtainable. Jacobs, *supra* at 1210.

In 1945, the Oklahoma Legislature, in an attempt to protect the correlative rights of landowners and to conserve the supply of oil, passed the Compulsory Unitization Act, OKLA. STAT. tit. 52 § 286 (Cum. Supp. 1949). This statute authorized the Corporation Commission, on certain conditions, to consider the whole reservoir as a single unit and apportion profits and expenses among the lessors and lessees. Two provisions of this Act cast doubt upon its constitutionality. The first requires the petition of the lessees of fifty per cent or more of the proposed unit area before the Corporation Commission has authority to begin proceedings to determine whether unitization should be effected. The second provides that within sixty days after entry of the unitization order, the lessees of fifteen per cent of the unit may invalidate it. It was argued that this Act constitutes an improper delegation of legislative power, and that it discriminates against lessors in favor of lessees, contrary to the Equal Protection clause of the Federal Constitution, U. S. CONST. AMEND. XIV, § 1, and to the Oklahoma Constitution, OKLA. CONST. Art. V, § 51.

It is indisputable that the legislature may not constitutionally delegate its law-making authority. *Panama Refining Co. et al. v. Ryan et al.*,

293 U. S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935). When an individual or non-official group is the recipient of the legislative power the delegation is particularly obnoxious. *Carter v. Carter Coal Co. et al.*, 298 U. S. 238, 311, 56 S. Ct. 855, 80 L. Ed. 1160 (1936). However, if the legislature itself conditions the application or rejection of the legislation upon the consent of private persons the delegation has not always been declared invalid. The Court struck down an act delegating to property owners the power to establish a building line, *Eubank v. City of Richmond*, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912); held unconstitutional an act permitting property owners to forbid erection of a home for the aged poor, *Washington* ex rel. *Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928); but sustained an ordinance requiring the consent of property owners before billboards could be erected in a residential district, *Thomas Cusack Co. v. Chicago et al.*, 242 U. S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917).

In determining the constitutionality of these and similar acts the courts have applied several tests. The primary one is whether the restriction is within the police power of the state. In *Washington* ex rel. *Seattle Title Trust Co. v. Roberge, supra,* the Court stressed the fact that there was no legislative finding that the erection of a home for the aged poor would be contrary to public health or morals; therefore, it was not within the police power to forbid its erection. However, in *Thomas Cusack Co. v. Chicago et al., supra,* the Court approved the delegation because it was convinced that the erection of billboards in residential districts was an invitation to crime and immorality.

Another test is whether the statute itself imposes the restriction but allows interested parties the right to reject it, or whether it permits them to apply it initially. In *Thomas Cusack Co. v. Chicago et al., supra,* the Court used this criterion to distinguish that case from *Eubank v. City of Richmond, supra.* The Court held that, unlike a statute allowing interested parties to initially apply a restriction on the use of property, a statute merely permitting property owners to remove a restriction already imposed is not objectionable. *Accord, Hampton & Co. v. United States,* 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928). In *Currin et al. v. Wallace et al.*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441 (1939), the Supreme Court upheld a statute authorizing the Secretary of Agriculture to require inspection of tobacco in interstate auction markets. Action by the Secretary was conditioned on approval of two-thirds of the growers voting at a referendum. The Court reasoned that Congress had merely placed a proper restriction upon its own regulation.

A new line of reasoning has appeared in recent decisions by the Supreme Court. In *United States v. Rock Royal Co-Operative Inc. et al.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446 (1939), the Secretary of Agriculture was possessed of authority to establish minimum

prices for milk sold to dealers upon approval of two-thirds of the producers affected. The Court sustained the consent provision on the ground that Congress had authority to put the order into effect without approval of anyone, and could, therefore, condition the act upon the consent of the group reasonably affected. *H. P. Hood & Sons, Inc. et al. v. United States et al.*, 307 U. S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478 (1939).

The Oklahoma Unitization Act does not enable lessees to impose restrictions upon the use of property. It merely conditions restrictive action by the Corporation Commission upon the petition of the lessees of interests in fifty per cent of the common source of supply. After petition there must be a finding by the Commission that a greater benefit will result to interested parties if the field is unitized. The provision permitting fifteen per cent of the lessees of a unitized field to veto the unitization order seems unobjectionable in that it applies to the removal rather than the imposition of a restriction. Finally, since the parties admit that restriction of oil production to achieve conservation is within the police power, it would satisfy the first test above—*i.e.*, that the regulation be within the scope of the police power.

Besides contesting the delegation of power, the lessors also argued that the unitization act improperly discriminates against them, because both the provision that provides for petition to the Commission to have the field unitized, and the provision that permits veto of the unitization plan are restricted to action by the lessees. The court answered this objection by declaring, as the Supréme Court did in *United States v. Rock Royal Co-Operative, Inc. et al., supra,* that since the legislature had power to enact the legislation without consent of either lessees or royalty owners, it was optional with it to require the consent of either. The dissenting judges insisted, however, that the lessors had a fixed and substantial interest in the oil being produced, and must be given a voice in deciding whether there will be unitization.

The Fourteenth Amendment does not prohibit legislation merely because it is limited either in the objects to which it is directed, or by the territory in which it is to operate. It requires that persons similarly situated be treated alike under the circumstances and conditions, both in the privileges conferred and the liabilities imposed, *Hayes v. Missouri,* 120 U. S. 68, 7 S. Ct. 350, 30 L. Ed. 578, (1887). In deciding which parties are similarly situated, the choice must not be arbitrary. *Field v. Barber Asphalt Paving Co.,* 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142 (1904). *Taggart et al. v. Claypool,* 145 Ind. 590, 44 N. E. 18 (1896), involved an ordinance which authorized the city council to annex contiguous territory, but which also provided that seventy-five per cent of the resident freeholders could prevent the annexation. The court argued that the distinction between resident and

non-resident owners was valid, because their interest in the protection and convenience afforded the area would differ. See *Currin et al. v. Wallace et al., supra.*

The purpose of the Oklahoma Unitization Act is to obtain the greatest possible recovery from the reservoir and provide for distribution to those entitled according to their proportionate interests in the common source. Because of their understanding of the problems involved the lessees are in a better position than the royalty owners to appraise the propriety of adopting unitization and to provide the evidence necessary for a unitization order. These factors together with the greater accessibility of lessees make their selection a practical and reasonable one.

Probably the court's most potent argument is that the lessors and lessees of mineral rights in oil producing land have no legitimate adverse interests. The profit of one varies directly with that of the other, and the success of the lessee inures to the benefit of the lessor. In any event the lessors are not precluded from opposing the unitization order, the instant case standing as an example of the lessors' right to appeal from the determination of the Corporation Commission.

It appears from this review of authority that the Oklahoma Unitization Act will withstand future attack on its constitutionality. It seems to be a wise measure in view of the limited reserves of these important natural resources, and the failure of less stringent legislative regulation in Oklahoma. The Oklahoma Legislature has produced a statute which, barring a reversal in the Supreme Court, should be accepted as a model for future oil conservation measures.

Lawrence S. May, Jr.

TORTS—PARENT AND CHILD—RIGHT OF AN UNEMANCIPATED MINOR TO SUE ITS PARENTS FOR PERSONAL INJURIES.—*Mahnke v. Moore,* .... Md. ...., 77 A. (2d) 923 (1951). The plaintiff was the illegitimate infant daughter of the defendant's decedent. The plaintiff's father hideously shot and killed her mother in her presence. After the shooting the father kept the plaintiff with the dead body for six days, and then committed suicide before her eyes. This action was brought in tort against the estate of the father to recover for shock, mental anguish, and permanent mental and physical injuries suffered by the plaintiff. The question of the child's illegitimacy had no bearing on the decision; the court treated the child as though she were legitimate. The court held that an action for personal injuries could be maintained by a minor against the parent, or as here, against the parent's estate.

The problem presented is not a new one, although its legal history is comparatively short. The first case deciding this point arose in 1891, *Hewellette v. George,* 68 Miss. 703, 9 So. 885 (1891), in which a minor brought action against her mother for false imprisonment for an allegedly unwarranted commitment to an insane asylum. The court decided against the child on the basis of public policy, laying down the rule, 9 So. at 887:

> The peace of society, and of the families composing society, and a sound public policy . . . forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

This rule has been followed by the majority of the decisions on point. *Smith v. Smith,* 81 Ind. App. 566, 142 N. E. 128 (1924); *Miller v. Pelzer et al.,* 159 Minn. 375, 199 N. W. 97 (1924); *Taubert v. Taubert,* 103 Minn. 247, 114 N. W. 763 (1908); *Mannion v. Mannion,* 3 N. J. Misc. 68, 129 Atl. 431 (1925); *Cannon v. Cannon,* 287 N. Y. 425, 40 N. E. (2d) 236 (1942); *Small v Morrison et al.,* 185 N. C. 577, 118 S. E. 12 (1923); *Securo v. Securo,* 110 W. Va. 1, 156 S. E. 750 (1931). *McKelvy v. McKelvy et al.,* 111 Tenn. 338, 77 S. W. 664 (1904), declared that the *Hewellette* case exemplified the common law rule, and that the child's only protection from personal invasions by his parent was the criminal law of the state.

The most extreme application of the *Hewellette* rule was made in *Roller v. Roller,* 37 Wash. 242, 79 Pac. 788 (1905), where a father was convicted of raping his fifteen year old daughter. The child brought a civil action for damages against him and received a favorable verdict in the lower court. On appeal the judgment was reversed, the court adhering to the parental immunity doctrine on the basis of "domestic tranquillity." It is regrettable that the parental immunity rule was extended so far. The court, apparently attempting to justify its stand, rationalized that there was no practical line of demarcation which could be drawn, ". . . for the same principle which would allow the action in the case of a heinous crime . . . would allow an action to be brought for any other tort." 79 Pac. at 789. Commenting on this case Professor Harper said, "To deny a recovery in damages to a daughter against a father who has been convicted of raping her on the ground that it would tend to disturb the beauty, tranquillity, and sanctity of that home is nothing short of absurdity." HARPER, TORTS § 285 (1933).

The theory that an action brought by a child against its parent for a tort would be barred at common law is to be doubted. Many of the early text writers agreed that an action of this kind would be allowed. See, *e.g.,* Reeve who says, in discussing the father's privilege of chastising his child, that a parent might administer such severe punishment as to make him liable to the child in an action for a battery;

the parent should be excused "For error of opinion . . . but for malice of heart, he must not be shielded from the just claims of the child." REEVE, DOMESTIC RELATIONS 420 (3d ed. 1874).

The early cases contribute little toward solving the problem. In *Lander v. Seaver*, 32 Vt. 113 (1859), where an action of trespass for assault and battery was brought by a pupil against a schoolmaster standing *in loco parentis*, the court intimated that a parent might be answerable for malice or wicked motives in punishing a child. See also *Bird v. Black et al.*, 5 La. Ann. 189 (1850); *Fitzgerald v. Northcote et al.*, 4 F. & F. 656, 176 Eng. Rep. 734 (1865). The early common law did, however, recognize that a child had property rights against its parents. *Alston v. Alston*, 34 Ala. 15 (1859). It could be logically assumed that if an action arising out of an interference with property rights were permitted, actions arising out of personal invasions would likewise be allowed, but there is no authority to sustain this position.

In the more modern cases opposition to the doctrine of parental immunity was first voiced in situations where the defendant stood in a position of *loco parentis* to the injured child. In *Dix v. Martin*, 171 Mo. App. 266, 157 S. W. 133 (1913), the defendant standing in the relation of *loco parentis* severely beat the child. In answer to the defendant's argument that the action could not be maintained because of the existence of the parent-child relationship, the court replied that even if that relationship did exist, the defendant still should be answerable for the injuries resulting from the assault. *Accord, Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903). Further opposition has been recorded in dissenting opinions. The dissenting judge in *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787, 788-9 (1927), argued that it was illogical to deny a child an action against its parents for the loss of a leg or other personal injuries, when the courts permit the child to bring an action for damages for the parents' negligent management of the child's property. He said, 212 N. W. at 789: "The reason that justifies the one and denies the other is metaphysical and not founded in justice. It exalts property above physical condition to enjoy property." See also *Small v. Morrison, supra* (dissenting opinion). In both these cases, however, the majority affirmed the *Hewellette* doctrine.

One of the first cases which allowed the action where the defendant was a natural parent and not merely in the position of *loco parentis*, was *Dunlap v. Dunlap*, 84 N. H. 352, 150 Atl. 905 (1930). There, a minor child was injured in the collapse of a staging, the result of the negligence of his parent-employer. The parent carried employers' liability insurance. The court held that the relationship of the parties at the time of the injury was not that of parent and child, but of master and servant. The right of a parent to reasonably discipline his child was recognized and affirmed, but it was stated that this im-

munity should not be extended to acts clearly outside the parental relationship. It was further said, 150 Atl. at 906:

> There never has been a common-law rule that a child could not sue its parent. It is a misapprehension of the situation to start with that idea and to treat the suits which have been allowed as exceptions to a general rule.

It is interesting to note that in the last three cases cited insurance companies were involved. The explanation of the tendency to permit the action in these cases seems to be that the real reason for the parental immunity rule is gone: the insurance company and not the parent is the real party in interest, the parent being only a nominal defendant. This point is illustrated in *Lusk v. Lusk et al.*, 113 W. Va. 17, 166 S. E. 538 (1932), where an action for damages was instituted by a minor daughter against her father and the school board for personal injuries sustained by her due to the alleged negligent operation of a school bus by her father. The court, granting recovery, pointed out that the judgment against the father would be absorbed by the insurance company, 166 S. E. at 539:

> There is no reason for applying the rule in the instant case. This action is not unfriendly as between the daughter and the father. A recovery by her is no loss to him. In fact, their interests unite in favor of her recovery, but without hint of "domestic fraud and collusion." . . . There is no filial recrimination and no pitting of the daughter against the father in this case. No strained family relations will follow. On the contrary, the daughter must honor the father for attempting to provide compensation against her misfortune. Family harmony is assured instead of disrupted. A wrong is righted instead of "privileged."
>
> When no need exists for parental immunity, the courts should not extend it as a mere gratuity.

A recent case which allowed recovery by a minor child against the parent is *Cowgill v. Boock*, ... Ore. ...., 218 P. (2d) 445 (1950). A minor son was killed through the negligence of his father, and an action was brought by the administrator of the son's estate against the administrator of the father's estate. The issue was whether the decedent minor, if he had lived, could have brought this action against his father. The court treated the action as if the father and son were living and decided that the child's administrator should recover. The court carefully reviewed the authorities, concluding that the only reason given for denying the action was that it subserved public policy. The court maintained that the general rule should be modified to allow an unemancipated minor to maintain an action for damages against its parents for willful or malicious personal torts since the peace, security and tranquillity of the home had already been disrupted by the father's acts, and recovery certainly does not violate public policy.

The court in the principal case conceded that parental authority should be maintained and that a child should not be allowed to re-

cover damages if the recovery would impair discipline or destroy the harmony of the family; but if the parent is guilty of acts that demonstrate a disregard of the normal parental relation, he should not be immune from suit by the child.

The necessity of the parental immunity rule is apparent. Without it a minor could bring an action for every real or imagined hurt, large or small, suffered at the hands of the parent. However, this rule should be tempered to allow recovery in situations similar to the instant case. The courts in both *Cowgill v. Boock, supra,* and the principal case, though still in the minority, have done much to bring about this desirable modification. As stated in *Dunlap v. Dunlap, supra,* 150 Atl. at 910:

> The law does not make fetishes of ideas. It limits them to their proper spheres. And so this concept of family life ought not to be used as a cloak for intended wrongs.

Richard F. Welter

TORTS—RES IPSA LOQUITUR—APPLICATION OF THE DOCTRINE IN MALPRACTICE ACTIONS.—*Bennett v. Los Angeles Tumor Institute et al.,* .... Cal. App. (2d) ...., 227 P. (2d) 473 (1951). The plaintiff brought an action for malpractice for X-ray burns. The alleged injuries consisted of blistering and peeling of the skin, and exudation of fluids as these symptoms are usually found in burns. The plaintiff failed to introduce expert testimony on the nature of the injuries, relying upon the doctrine of res ipsa loquitur. The trial court entered a non-suit which was affirmed by the appellate court, in the instant case, which held that the doctrine of res ipsa loquitur did not apply where a layman is unable to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.

Generally, a physician is liable to his patient for a failure to exercise an ordinary and reasonable degree of skill which is generally possessed by others of his profession in the same locality. *Engelking v. Carlson et al.,* 13 Cal. (2d) 216, 88 P. (2d) 695 (1939); *Hesler v. California Hospital Co. et al.,* 178 Cal. 764, 174 Pac. 654 (1918). This means the minimum skill common to the profession and reasonable care in exercising it. The presumption is that the physician used reasonable care and skillfully treated his patient. *Donahoo v. Lovas,* 105 Cal. App. 705, 288 Pac. 698 (1930). The plaintiff must produce affirmative evidence that the defendant was unskillful or negligent and show the causal connection between the injury and the want of care. What constitutes proper and usual care in diagnosis and treatment

is a question for experts and can be established only by their expert testimony. *Moore v. Belt et al.*, 34 Cal. (2d) 525, 212 P. (2d) 509 (1950); *Perkins v. Trueblood*, 180 Cal. 437, 181 Pac. 642 (1919).

There is, however, a well recognized class of cases where there is obviously a definite want of due care and skill constituting grounds for an inference of negligence. The thing speaks for itself: the facts of the occurrence warrant the inference that the result is due to negligence without the aid of an expert voice. In these situations, the doctrine of res ipsa loquitur is clearly applicable in malpractice actions. *Waddle v. Sutherland*, 156 Miss. 540, 126 So. 201 (1930).

In malpractice cases the instrumentality that causes the injury must be under the exclusive control of the defendant, and the result must be of a nature that a layman could conclude *from common knowledge* that these consequences ordinarily do not occur without negligence or lack of skill. *Engelking v. Carlson, supra; Pendergraft v. Royster*, 203 N. C. 384, 166 S. E. 285 (1932). The inference based on common knowledge is the basis for res ipsa loquitur. Where scientific opinion is not required to throw light on the subject the doctrine is applicable. But, if expert evidence is required to show not only what was done, but how and why it occurred, then the question is outside the realm of the testimony of laymen, and the doctrine will not apply. SHAIN, RES IPSA LOQUITUR 469-70 (1945), states the rule:

> . . . *res ipsa loquitur* applies where, during the performance of surgical or other skilled operations, an ulterior act or omission occurs, the judgment of which does not require scientific opinion to throw light upon the subject, while it would not apply in cases involving the merits of diagnosis and scientific treatment.

Many decisions that state that res ipsa loquitur is not applicable in malpractice cases, disclose upon closer examination that they refer to instances where there occurs an unfavorable result or unsuccessful treatment for which the physician cannot be held an insurer. *Ingram v. Harris*, 244 Ala. 246, 13 So. (2d) 48 (1943); *Stacy et al. v. Williams*, 253 Ky. 353, 69 S. W. (2d) 697 (1934); *Inglis v. Morton*, 99 Wash. 570, 169 Pac. 962 (1918). A physician does not undertake to insure a cure or guarantee results. The following statement in *Ewing et al. v. Goode*, 78 Fed. 442, 443 (C. C. S. D. Ohio 1897), is often quoted to emphasize this point:

> If the maxim, "Res ipsa loquitur," were applicable . . . and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the "ills that flesh is heir to."

Examples of situations where the common knowledge and experience of a layman can conclude negligence without the necessity of expert opinion are operations where a sound part of the body is removed instead of the diseased part, *Thomsen v. Burgeson*, 26 Cal. App. (2d)

235, 79 P. (2d) 136 (1938); a failure to remove a surgical sponge after an operation, *Armstrong et ux. v. Wallace et ux.*, 8 Cal. App. (2d) 429, 47 P. (2d) 740 (1935); burns caused by hot compresses or water bottles, *Timbrell et ux. v. Suburban Hospital Inc. et al.*, 4 Cal. (2d) 68, 47 P. (2d) 737 (1935).

Where the injury complained of has resulted from an X-ray burn, application of the doctrine becomes particularly difficult because the ordinary aftereffects of the treatment are often indistinguishable from an actually harmful destruction of tissue. For this reason, a rule of degree rather than of kind should be adopted. In *Johnson v. Marshall,* 241 Ill. App. 80 (1926), the plaintiff suffered severe burns about the face and eyes when X-ray was employed in a course of treatment. The doctrine was held to apply, the severity and extent of the burn serving to distinguish that decision from the principal case. But in *Nixon et ux. v. Pfahler,* 279 Pa. 377, 124 Atl. 130 (1924), where the plaintiff was struck on the knee by a spark from the machine while having her teeth X-rayed, the doctrine was rejected. The court held that, because the medical profession must occasionally employ dangerous agencies, to attach a presumption of negligence to their use would make the doctor an insurer of his patient.

If it is reasonably probable that the injury may be the result of any one of several causes, the doctrine generally will not apply. *La-Porte v. Houston et al.*, 33 Cal. (2d) 167, 199 P. (2d) 665 (1948); *Smith v. McClung,* 201 N. C. 648, 161 S. E. 91 (1931). This rule was followed in *Antowell v. Friedman,* 197 App. Div. 230, 188 N. Y. Supp. 777 (2d Dep't 1921), when the evidence showed that it was just as probable that the burn resulted from hypersensitivity as from negligence. But in *Waddle v. Sutherland supra,* the court held that hypersensitivity can always be detected by reasonable care and skill before third degree burns occur. Similarly, when the patient was burned after 161 X-ray treatments, application of res ipsa loquitur was allowed because it was plain that the burns could not be attributed to hypersensitivity. *Lewis v. Casenburg,* 157 Tenn. 187, 7 S. W. (2d) 808 (1928).

In holding that the doctrine of res ipsa loquitur is applicable only in a restricted class of malpractice actions, the court in the principal case has illustrated the prevalent reluctance to extend the doctrine. The inference of negligence merely from the fact of unsatisfactory results of medical treatment must be nearly exclusive of any other inference before hypothecation of the rule in a given case will be permitted. In view of the fact that a layman's knowledge of the nature of results from medical treatment by technical devices is at best fragmentary, this rule is both reasonable and necessary.

Martin J. Rodgers

WILLS—JOINT WILL—EXECUTION OF A JOINT WILL AS EVIDENCE OF AN IRREVOCABLE CONTRACT TO MAKE A WILL.—*Jacoby v. Jacoby et al.*, ... Ill. App. ...., 96 N. E. (2d) 362 (1950). Defendant, Laura Jacoby, and her husband executed a joint and mutual will which was ordered prepared by the husband in anticipation of a journey, to provide for their children in the event the testators died in a common disaster. By its provisions the survivor was to take the entire estate, but if the common disaster occurred, the estate was to be held in trust for the children. It was clearly shown that the will was prepared on short notice and that the defendant had little knowledge of its contents other than that it was a will. The husband died after the family returned from the trip and the defendant had the will probated. Some years after the death of the husband, the defendant made another will reducing the legacy to her son, the plaintiff, because of his flagrant misconduct. Plaintiff brought a bill in equity to restrain his mother from revoking the joint will and to have the court declare that it had been executed pursuant to a contract between the testators, and therefore was irrevocable. The bill was dismissed for want of equity and plaintiff appealed. The appellate court affirmed the judgment in the instant case, holding that neither the provisions of the will itself, nor the facts and surrounding circumstances, constituted clear and convincing evidence that the will was executed pursuant to a contract. The will was therefore found to be revocable.

The decision follows the general rule in the United States that a joint and mutual will—one that is reciprocal in its terms, contained in one instrument and signed by two or more testators, ATKINSON, WILLS § 69 (1937); ROLLISON, WILLS § 183 (1939)—is insufficient of itself to establish a contract between the parties. In *Rolls et al. v. Allen et al.*, 204 Cal. 604, 269 Pac. 450, 452 (1928), the court said ". . . presumptions will not and should not, in such cases, take the place of proof." In *Hays et al. v. Jones et al.*, 122 Fla. 67, 164 So. 841, 845 (1935), the court held that in construing a joint and mutual will, "no express or necessarily implied promise is involved." It is significant that this case involved a will which only gave a life estate to the survivor with remainder over, and not an absolute disposition.

On the other hand, it was stated in *Frazier et al. v. Patterson et al.*, 243 Ill. 80, 90 N. E. 216, 218 (1909), that mere execution of a joint will left no other presumption than that there must have been ". . . some previous understanding or agreement between the parties." This statement was criticized by the courts in the instant case, 96 N. E. (2d) at 367, and in *Menke v. Duwe et al.*, 117 Kan. 207, 230 Pac. 1065 (1924), where a joint will was signed by the wife who thinking it was necessary to validate her husband's will, was unaware that it was her own will as well.

Mere execution of a joint reciprocal will is not sufficient to establish a contract, *Tutunjian et al. v. Vetzigian et al.*, 299 N. Y. 315, 87 N. E. (2d) 275 (1949), nor is it sufficient evidence in itself, without reference to its terms, of a contract, In re *Rhodes' Estate*, 277 Pa. 450, 121 Atl. 327 (1923), nor does it create a presumption of a contract, *Curtis et al. v. Aycock et al.*, 179 S. W. (2d) 843 (Tex. Civ. App. 1944). In order to establish a contract consideration must be shown. *Buchanan et al. v. Anderson et al.*, 70 S. Ct. 454, 50 S. E. 12 (1905). See also *Ginn et al. v. Edmundson*, 173 N. C. 85, 91 S. E. 696 (1917).

The courts are much more apt to construe a contract from the existence of a joint and mutual will if the testators, as husband and wife, devise a life estate to the survivor with remainder over to designated beneficiaries. A majority of courts hold or state in dicta, that in order to promote equity, such a testamentary disposition evidences an intent to be bound by a contract, which cannot be revoked by the survivor especially if he has taken the benefits under the will. See In re *Adkins' Estate*, 161 Kan. 239, 167 P. (2d) 618 (1946). *Contra, Hays et al. v. Jones et al., supra.* In *Lewis et al. v. Lewis*, 104 Kan. 269, 178 Pac. 421 (1919), the surviving testator of a reciprocal joint will remarried, and after his death his second wife sought to have the will set aside. The court held that an intent to contract was deducible from the will itself, and that it could not be declared invalid. In *Brown et al. v. Brown et al.*, 53 N. M. 379, 208 P. (2d) 1081 (1949), the surviving wife had taken the benefits under a will, which was twice what she otherwise would have received as her statutory portion of her husband's estate. She was not allowed to revoke the will. The same result was reached in *Nye et al. v. Bradford*, 144 Tex. 618, 193 S. W. (2d) 165 (1946), and approved in dicta in *Puckett et al. v. Hatcher et al.*, 307 Ky. 160, 209 S. W. (2d) 742, 744 (1948). To be distinguished are those cases in which the court found that a contract was evident from the terms of the will. See *e.g., Watkins et al. v. Covington Trust and Banking Co. et al.*, 303 Ky. 644, 198 S. W. 964 (1947).

It must be recalled that not all courts hold the execution of a joint and mutual will devising a life estate to the surviving spouse as of itself sufficient to raise a contract. See *e.g., Hays et al. v. Jones et al., supra.* The decisions which refuse to so hold can be partially resolved, as suggested by Justice Smith of the Supreme Court of Kansas, if one remembers that the question of whether there is a contract is strictly a matter of proof. The existance or non-existance of a contract should be determined by the courts with the view that proof of a contract and proof of a will are entirely different matters. Smith, *Joint and Mutual Wills*, 20 KAN. JUD. COUNCIL BULL. 3 (1946). The assertion of dogmatic rules was criticized by Eagleton, *Joint and Mutual Wills: Mutual Promises to Devise as a Means of Conveyancing*, 15 CORNELL L. Q. 358, 361 (1930), where he points out that while the form of the will

may have some evidentiary value, the courts should continue to give effect to the intention of the parties by considering *all* of the evidence; unfortunately, however, ". . . the result of the individual case is too commonly summarized as a dogmatic rule based entirely upon the form of the wills." This is substantially in accord with the views of Justice Smith, as he concludes that mere form should not be controlling: proof of the contract should be shown by the intent of the parties and the surrounding circumstances, with each case standing on its own facts.

The efforts of the courts to determine, in an equitable fashion, the efficacy of a joint will as evidence of a contract give ample warning against any attempt to set fixed rules based merely on the form of the instrument. This would be an injustice to the testators when it is doubtful that they had any intention to bind each other. As the court in the instant case clearly pointed out, this is especially true where the mutual disposition is absolute, and there is no evidence other than the fact of the joint and reciprocal will of an intent to bind the survivor.

Anthony V. Amodio

WILLS—REVOCATION—ADMISSIBILITY OF TESTATOR'S DECLARATIONS OTHER THAN A PART OF THE RES GESTAE TO PROVE ANIMUS REVOCANDI.—*Fletcher Trust Co. et al. v. Morse*, ... Ind. ...., 97 N. E. (2d) 154 (1951). Cheston L. Heath executed his will designating the appellee Morse as a beneficiary. The testator's will was found after his death with heavy lines drawn through the name Morse, with a statement attached to the will specifically excluding him from any benefits under it. This action is for a declaratory judgment to determine the appellee's status under the will. At trial undisputed evidence was offered to show that the appellee's name had been crossed out some time after the execution of the will. However, no evidence was tendered as to who performed the act of obliteration, and no direct evidence was introduced to determine who had the custody of the will from the time of its execution until it was found. In the instant case, it was decided that the bequest to the appellee had been effectively revoked.

The fundamental issues confronting the court were whether the attempted revocation was actually an alteration, and thus a nullity; and whether declarations, not a part of the *res gestae*, are admissible as evidence of the testator's revocatory intent.

The revocation of a will is generally controlled by statute. Many statutes declare that no will in writing can be revoked in whole or in part except by the express means provided by the statute. See, *e.g.*, IND. ANN. STAT. § 7-301 (Burns 1933). These statutes are uniformly construed to grant the power to partially revoke a duly executed will.

McPherson v. Clark, 3 Bradf. 92 (N. Y. Surr. 1854); *Eschbach v. Collins,* 61 Md. 478 (1884) (". . . or any clause . . .,").

Although statutes authorize the partial revocation of a will they cannot be construed to permit an alteration—the two words are not synonymous. *Eschbach v. Collins, supra.* "To revoke a testamentary disposition is to annul it, so that, in legal contemplation, it ceases to exist, and becomes as inoperative as if it had never been written." *Eschbach v. Collins, supra,* 61 Md. at 499. However, when words are changed or added, the will is altered and a new testamentary disposition is made. *Gardiner v. Gardiner et al.,* 65 N. H. 230, 19 Atl. 651 (1890). When the testator alters his will but does not, in the manner prescribed by statute, authenticate the alteration, the will ". . . stands in legal force, the same as it did before, so far as it is legible after the attempted alteration." *Wolf v. Bollinger,* 62 Ill. 368, 374 (1872).

The increase in a beneficiary's interest resulting from a partial revocation is not an alteration or new bequest. A contrary rule would, by restricting and destroying their effect, render statutes authorizing partial revocation inoperative. *Swinton v. Bailey,* 4 App. Cas. 70 (1879). "The increase of the residuary estate which may result from . . . [partial revocation] is not a new testamentary disposition, but a mere incidental consequence resulting from the exercise of the power conferred on the testator by . . . statute." *Brown et al. v. Brown et al.,* 91 S. C. 101, 74 S E. 135, 136 (1912). In the principal case, the increase in the residuary legatee's estate was not a new testamentary gift but a "mere incidental consequence" of the exercise of the testator's power to revoke.

When a will, known to have been in the actual or constructive possession of the testator until his death, is missing or is found in a condition which meets the physical requirements for revocation, it is inferable that whatever has happened to the will is the result of the testator's actions. In fact, a legal presumption arises that the testator has performed the acts *animus revocandi,* In re *Kennedy's Will,* 167 N. Y. 163, 60 N. E. 442 (1901). The need for proof of a testator's intent most often appears when a party seeks to rebut that presumption. The question then arises whether the declarations of the testator, not a part of the *res gestae,* are admissible as evidence of the testator's state of mind, *i.e.,* intent, at the time the act was performed.

The hearsay evidence rule prohibits the testimonial recital of the unsworn oral or written declarations of a person not available for cross-examination. 5 WIGMORE, EVIDENCE §§ 1360 *et seq.* (3d ed. 1940). However, according to the weight of authority, a testator's oral or written declarations are admissible to prove intent, without regard to the time at which they were made. *E.g.,* In re *Bond's Estate, Williams et al. v. Presbytery of Portland et al.,* 172 Ore. 509, 143 P. (2d) 244 (1943).

Declarations alone are insufficient to establish a revocation, but when evidence drawn from physical facts raises the issue of revocation, there is no apparent reason for refusing to admit declarations of an intent to revoke. *Stuart et al. v. McWhorter et al.*, 238 Ky. 82, 36 S. W. (2d) 842 (1931). In *Harring et al. v. Allen*, 25 Mich. 505, 507 (1872), the court stated:

> It is not pretended that any expressions of the kind in question could be used to establish specific facts embraced by the expressions. The point to which the evidence is referred, is the state and bearing of the testator's mind, whether favorable or unfavorable, to the will.

For example, a declaration of affections is "proper evidence" of the testator's feelings at the time it is made. That fact is the basis for the inference that he had that feeling for a period of time prior to the making of the statement. Appeal of *Spencer*, 77 Conn. 638, 60 Atl. 289 (1905).

An analysis of the cases admitting the declarations of a testator reveals that they are of two classes. In the first, the statements are admitted on the grounds of necessity and trustworthiness. According to Wigmore, these are the basic reasons underlying all exceptions to the hearsay rule. 5 WIGMORE, EVIDENCE §§ 1420 *et seq.* (3d ed. 1940). Typifying the cases of this class is *Stuart et al. v. McWhorter et al., supra,* in which the court stated that justice and truth demanded the admission of a testator's declarations of intent. In In re *Shelton's Will,* 143 N. C. 218, 55 S. E. 705 (1906), it was argued that because the knowledge of a testator is peculiar to him, and he has no reason to falsify his statements, his declarations should be admitted as an exception to the hearsay rule.

In the decisions of the second class, the hearsay rule is simply ignored, and, with no reason given, the evidence admitted. "It is clear . . . that this court has always assumed that such declarations were admissible." *Burton v. Wylde et al.*, 261 Ill. 397, 103 N. E. 976, 978 (1913). A reading of the cases in this group does not clearly disclose whether the judges consider such declarations circumstantial evidence, rather than hearsay testimony, and thus not subject to the rule; whether they consider them to be exempted or excepted testimony; or whether they actually accept the declarations for reasons similar to those relied upon by the decisions in the first class.

Once the declarations have been admitted, their force ". . . to prove the attitude and condition of the testator's mind, will, of course, depend upon an endless variety of circumstances, and in each case the good sense of the jury must ascertain it, and decide." *Harring et al. v. Allen, supra,* 25 Mich. at 508. It is immaterial that the declarations might possibly be made in jest since the weight to be given them is for the jury to determine. *Patterson et al. v. Hickey,* 32 Ga. 156 (1861). To decide the truth or falsity of the testator's statements is the duty of the jury. *Collagan v. Burns,* 57 Me. 449 (1867).

In the few jurisdictions, including New York, Colorado, Vermont, and Kansas, which constitute the minority, the hearsay rule is more stringently applied and the courts employ reasoning similar to that of the Supreme Court of the United States in *Throckmorton v. Holt et al.*, 180 U. S. 552, 21 S. Ct. 474, 45 L. Ed. 663 (1901). There it was held that declarations not a part of the *res gestae* were inadmissable, except for those declarations which involuntarily mirror the testator's mental capacity. The Court stated, 180 U. S. at 576:

> . . . the only possible importance of such [prior or subsequent] declarations rests in the claim that they are true, and an inference is sought to be drawn which is founded wholly upon the assumption of their truth. Now if their only value rest upon that assumption, then the fact that they are unsworn declarations brings them at once within the bar of the general rule of evidence that unsworn declarations are not admissible.

Under the minority rule the declaration of a testator, not offered to prove capacity, will be received only through the *res gestae* exception to the hearsay rule. In re *Glass' Estate,* 14 Colo. App. 377, 60 Pac. 186 (1900); *Caeman et al. v. Van Harke et al.,* 33 Kan. 333, 6 Pac. 620 (1885); In re *Kennedy's Will, supra;* In re *Pardy's Estate,* 161 Misc. 77, 291 N. Y. Supp. 969 (Surr. 1936); In re *Campbell's Will,* 102 Vt. 294, 147 Atl. 687 (1929).

In the principal case, the condition of the will—heavy lines having been drawn through the appellee's name—and the fact that the testator had, at least, partial possession of the document were held, by the court, to raise a prima facie presumption of revocation. In conformity with the weight of authority, the court correctly decided that the declarations of a testator were admissible, regardless of the time at which they were made, to prove revocatory intent and thus support the presumption. A doubt, concerning the importance of that ruling to the decision in this case, is created by the court's comment that because the evidence had not been objected to in the lower court, the issue of admissibility was not properly before it. The statements of the court furnish no definite basis for determining the decisiveness assigned to this technical point. Whether it is a mere supplemental reason, or is itself sufficient for the holding, is not apparent.

The instant case is evidence of the fact that a majority of the courts are satisfied with the present status of the law which allows the admission of statements of the testator that show *animus revocandi,* regardless of whether or not the statements are a part of the *res gestae.* It is submitted that a clarification of the reasons why the courts permit this evidence to be introduced should be forthcoming.

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